EDITOR'S NOTE

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No. 84-1362-CFX
Status: GRANTED

Title: Public Service Commission of Maryland, Petitioner
v.
Chesapeake and Potomac Telephone Company of Maryland

Docketed:
February 15, 1985

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Emge, Kirk J.

Counsel for respondent: Sarver, J. William

Entry	Date	Note	Proceedings and Orders
1	Feb 15 1985	G	Petition for writ of certiorari filed.
2	Mar 27 1985		Brief of respondent C&P Telephone Co. of MD in opposition filed.
3	Apr 3 1985		DISTRIBUTED. April 19, 1985
5	May 28 1985		REDISTRIBUTED. June 13, 1985
7	Jun 14 1985		REDISTRIBUTED. June 20, 1985
8	Jun 24 1985		Petition GRANTED. The case is set for oral argument in tandem with No. 84-871, Louisiana Public Service Commission v. Federal Communications Commission; No. 84-889, California v. Federal Communications Commission; No. 84-1054, Public Utilities Commission of Ohio v. Federal Communications Commission; and No. 84-1069, Florida Public Service Commission v. Federal Communications Commission. Justice Powell and Justice O'Connor took no part in the consideration or decision of this order.
			**
10	Aug 7 1985		Order extending time to file brief of petitioner on the merits until August 23, 1985.
11	Aug 14 1985		Joint appendix filed.
12	Aug 23 1985		Brief of petitioner PUC of Maryland filed.
13	Aug 24 1985		Brief amicus curiae of State Regulatory Commissions, et al. filed.
14	Oct 7 1985		Brief of respondent C&P Telephone Co. of MD filed.
15	Oct 7 1985		Brief amicus curiae of FCC filed.
16	Oct 15 1985	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Nov 4 1985		Motion of the Solicitor General for leave to participate in GRANTED. Justice Powell and Justice O'Connor OUT.
18	Nov 9 1985		Record filed.
19	Nov 9 1985		Certified copy of original record on appeal and proceedings, 3 volumes, received.
20	Nov 19 1985		CIRCULATED.
21	Nov 21 1985		SET FOR ARGUMENT, Monday, January 13, 1986. (4th case).
22	Jan 3 1986	X	Reply brief of petitioner PUC of Maryland filed.
23	Jan 13 1986		ARGUED.

84-1362

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

The Communications Act provides that a private party may bring an injunction action in Federal District Court to enforce "any order" of the Federal Communications Commission ("FCC") other than for the payment of money against "any person." The Fourth Circuit ruled *below* in conflict with the First Circuit that the statutory phrase "any order" includes an FCC order issued in a rulemaking proceeding. The Fourth Circuit further ruled that state regulatory commissions are "persons" within the meaning of 47 U.S.C. § 401(b) and are therefore within the enforcement jurisdiction of the Federal courts under the Communications Act. Against this background, the questions presented are as follows:

1. Whether Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), embraces orders issued by the FCC in the course of rulemaking proceedings as the FCC has urged and the Fourth Circuit has held, or whether it is limited to FCC orders issued in adjudicatory proceedings, as the First Circuit has held.

2. Whether a state utility regulatory commission constitutes a "person" within the meaning of 47 U.S.C. § 401(b).

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Maryland Public Service Commission petitions for certiorari to review the judgment and decision of the Court of Appeals in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit which is reported at 748 F.2d 879, is attached at Appendix A. The decision of the United States District Court for the District of Maryland is reported at 560 F. Supp. 844 (1983) and is attached at Appendix B. The Opinion of the United States Court of Appeals for the First Circuit, which is reported at 742 F.2d 1, is attached at Appendix C. The *Memorandum Opinion and Order* (Preemption Ruling of the Federal Communications Commission) is reported at 92 F.C.C.2d 864 (1983) and is attached at Appendix D.

JURISDICTION

The decision of the Fourth Circuit Court of Appeals was entered on November 20, 1984. A timely Petition for Writ of Certiorari has been filed by the Public Service Commission of Maryland. This Court has jurisdiction to review the decision below under 28 U.S.C. § 1254(i).

STATUTORY PROVISION

Section 401(b) of the Communications Act of 1934, 47 U.S.C. § 401(b), provides as follows:

> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

STATEMENT OF FACTS

This case presents a direct conflict between the Fourth and First Circuits over the jurisdiction of federal courts to enforce FCC orders under Section 401(b) of the Communications Act, 47 U.S.C. § 401(b). Both cases, and a number of other similar cases now pending in this Court and in other lower federal courts, arise out of the same background facts.

Local telephone facilities in the United States are used interchangeably to provide both interstate and intrastate

telephone service. As a result of this dual use of local facilities, regulatory control over the operations and facilities of local telephone companies has long been the shared responsibility of federal and state or local authorities.

The Communications Act expressly reserved to the states the authority to prescribe rates for intrastate and local telephone service.[1] Jurisdiction over intrastate rates, services, charges and practices is left to the exclusive jurisdiction of the states when they are "separable from and do not substantially affect the conduct or development of interstate communications."[2]

Similarly, Section 220 of the Communications Act gives the FCC authority to determine certain depreciation issues for local telephone facilities.[3] The statute also requires that the FCC give state agencies an opportunity to present their views and recommendations before any new accounting requirement for depreciation issues is implemented by the FCC.[4]

In rulemaking proceedings in 1980 and 1981, the FCC revised its depreciation rules for telephone company facilities by changing from "whole life" to "remaining life" depreciation methods.[5] Various state commissions participated in the FCC rulemaking proceedings, many of them expressing disagreement with and disapproval of the proposed changes.

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[1] 47 U.S.C. § 152(b) and § 221(b).

[2] *North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787, 793 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1977).

[3] 47 U.S.C. § 220(a), (b).

[4] 47 U.S.C. § 220(b), (h).

[5] *In Re Amendment of Part 31 etc.*, 83 FCC2d 267 (1980) reconsidered 87 FCC2d 916 (1981).

On April 27, 1982, the FCC formally affirmed its longstanding and undisputed policy through a *Memorandum Opinion and Order* which stated that state regulatory commissions are not preempted by the FCC from adopting depreciation methods for purposes of intrastate rate making which are inconsistent with methods approved by the FCC.[6] The Order was based on a full FCC review of the Communications Act, its legislative history, and years of case law and concluded that there was no clear Congressional intent to preempt inconsistent state prescription of depreciation rates. The Order further stated that such state regulation would not frustrate or conflict with valid federal policies.

In December 1982, the FCC ruled that certain telephone companies must use "remaining life" depreciation methods in setting their *interstate* rates.[7] The FCC expressly said, however, that it would determine the applicability of this choice of methodologies to *intrastate* rates in a "separate proceeding."[8]

The "separate proceeding" was a rulemaking proceeding, which initially involved a different depreciation question; i.e., whether certain telephone assets should be depreciated or treated as current expenses.[9] The FCC concluded that some of the assets should be charged as current expense, at least insofar as interstate rates were concerned.[10] Several telephone companies then asked the

[6] 89 FCC2d 1094 (1982) (April 27 *Memorandum Opinion and Order.*)

[7] *In Re Prescription of Revised Percentages of Depreciation, etc.*, 92 FCC2d 920 (1982).

[8] *Id.* at 928-29.

[9] *In Re Amendment of Part 31, Uniform System of Accounts, etc.*, Docket No. CC 79-105.

[10] 85 FCC2d 818 (1981) *clarified as only affecting interstate rates*, 89 FCC2d 1094 (1982).

FCC to reconsider whether it should not apply this rule to *intrastate* rates.

In response, in January 1983, the FCC reversed its position enunciated in the April 27 Order and concluded that the language and legislative history of the Communications Act, coupled with its authority to preempt state actions that interfere with federal policies, empowered the FCC to preempt inconsistent state depreciation policies and rates.[11] This Preemption Ruling purports to require the use of Equal Life Group and Remaining Life Depreciation Methods in establishing intrastate rates and preempts the adoption of contrary methods by state commissions.

In July 1982, The Chesapeake and Potomac Telephone Company of Maryland ("C&P") filed an application for a rate increase for its intrastate operations with the Public Service Commission of Maryland ("Md. PSC"). *Inter alia*, C&P proposed the use of remaining life depreciation methods and asserted that the FCC's prescription of such rates required their use for intrastate rate-making purposes. The Md. PSC rejected the proposal and affirming its longstanding preference for the "whole life" depreciation method, concluded that the depreciation rates prescribed by the FCC were inappropriate for establishing intrastate rates in Maryland.

Instead of seeking judicial review of the rate order through the state court system, C&P filed a complaint in United States District Court for the District of Maryland seeking declaratory and injunctive relief.

The District Court granted a preliminary injunction and then closed the docket[12] pending the outcome of a Fourth

[11] *Memorandum Opinion and Order*, 92 FCC2d 864 (1983) ("Preemption Ruling").

[12] *The Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland*, 560 F. Supp. 844 (D. Md. 1983).

Circuit appeal[13] challenging the validity of the FCC Preemption Order. In the interim, the Md. PSC filed an appeal from the District Court's Order to the Fourth Circuit Court of Appeals.[14]

On June 18, 1984, the Fourth Circuit entered an Opinion affirming the Preemption Order in the *Virginia State Corporations Commission* proceeding (*supra*). On November 20, 1984, the Fourth Circuit affirmed the District Court in the Md. PSC proceeding holding that (1) the Preemption Order was an "order" within the meaning of 47 U.S.C. § 401(b) and, therefore, enforceable under the jurisdiction of the District Court; and (2) that the Md. PSC is a "person" within the definition of the Communications Act and, therefore, subject to the jurisdiction of the District Court in enforcement proceedings brought under § 401(b).

In a case presenting basically the same issues, *New England Telephone and Telegraph Co. v. Public Utilities Commission of Maine,*[15] the First Circuit Court of Appeals reached the opposite result in holding that the word "order" in the Communications Act does not encompass an FCC rulemaking decision such as the Preemption Order.[16]

REASONS FOR GRANTING THE WRIT

Certiorari is justified on two independent grounds. First, the central issue in the case — the interpretation of

[13] *Virginia State Corporations Commission v. F.C.C.*, 737 F.2d 388 (4th Cir. 1984) petition for cert. filed sub. nom. *California, et al. v. FCC.*, No. 84-889 (U.S. filed December 12, 1984).

[14] *The Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland,* 748 F.2d 879 (4th Cir. 1984).

[15] 570 F. Supp. 1558 (D. Me. 1983), rev'd 742 F.2d 1 (1st Cir. 1984) petition for cert. filed, No. 84-900 (U.S. filed December 5, 1984).

[16] 742 F.2d 1, 2 (1st Cir. 1984).

Section 401(b) of the Communications Act — is one on which the Fourth and First Circuits are in direct conflict. Therefore, a decision by this Court is necessary to ensure that the federal courts apply that statute in a consistent manner. Second, the Fourth Circuit was incorrect in concluding that a state public utility commission constitutes a "person" within the meaning of 47 U.S.C. § 401(b). This Court should not allow to stand a Fourth Circuit ruling which in essence confers authority on the federal District Courts to enforce FCC decisions against state utility commissions on the strength of an expanded definition of "person" that clearly reaches beyond the language of the Communications Act.

The instant litigation involves a rate-making proceeding conducted by an administrative agency charged with the responsibility of promoting the public interest in the State of Maryland. The extraordinary powers of injunction should be employed to interfere with the action of a state only in a case of manifest oppression,[17] which clearly does not exist here. Private interests must give way to the realization of the public interest inherent in the notions of comity and adminstrative autonomy. The principles of comity support equitable restraint in this case because interference with State utility rate regulation is involved.

It cannot be disputed that granting the injunctive relief sought in this case interfered with Maryland's control of intrastate utility rates, an area which has historically been reserved to the states by Congress.[18] Federal courts should not interfere with the state rate-making process by granting such extraordinary relief. The public interest as

[17] *Petroleum Exploration, Inc. v. Public Service Commission of Kentucky,* 304 U.S. 209, 222 (1938).

[18] *Gulf Water Benefaction Company v. The Public Utility Commission of Texas,* 674 F.2d 462 (5th Cir. 1982).

reflected in the notions of comity and administrative autonomy clearly do not support such actions since they promote needless conflict in the Federal-State relationship and unnecessary interference with state functions.

A. There Is A Direct Conflict Between The Fourth And First Circuits.

Section 401(b) of the Communications Act authorizes "any party injured" to bring a federal enforcement action against "any person" who disobeys "any order" of the FCC, except an order for the payment of money. The issue in this case is whether the word "order" as used in Section 401(b) includes an order, such as the FCC's Preemption Order of January 6, 1983, insofar as the order is issued in the course of a rulemaking rather than an adjudicatory proceeding. A direct conflict between the circuits exists on this legal issue.

The First Circuit below held that Section 401(b) is limited to adjudicatory orders, that the FCC Preemption Order was not an adjudicatory order and, therefore, the Preemption Order was not an "order" within the meaning of Section 401(b). As a result, it directed the District Court to dismiss New England Telephone's private action to enforce the Preemption Order.

The Fourth Circuit ruled that the Preemption Order is an "order" within the meaning of Section 401(b),[19] citing *Virginia State Corporations Commission v. FCC*, which held that the Preemption Order was a valid and complete preemption of state regulation regarding interstate and intrastate depreciation rates and methods for specified telephone equipment.[20] The Fourth Circuit, therefore,

[19] *C&P v. PSC of Md.*, 748 F.2d 879, 882 (4th Cir. 1984).

[20] *Id.* at 880; *see also Virginia State Corporations Commission v. FCC*, 737 F.2d 388 (4th Cir. 1984), petition for cert. filed sub. nom *California et al. v. FCC*, No. 84-889 (U.S. filed December 12, 1984).

sustained an injunction against the Md. PSC requiring it to obey the *same* Preemption Order that the First Circuit held not to be enforceable under Section 401 against the Maine Commission.

The statutory issue posed by the conflict is not an isolated one limited to two circuits. The Preemption Order purports to be binding on every public utility commission of every state. A number of state commissions have challenged the authority of the FCC to issue such an order and enforcement actions have been brought in the District Courts and subsequently appealed in a number of circuits.[21] The issue itself is likely to recur. The direct disagreement of two circuits on a recurring issue of federal statutory construction amply justifies Supreme Court review. *See* Sup. Ct. R. 17.1(a).

B. The Fourth Circuit Has Erroneously Construed Section 401(b) In Holding That A State Utility Commission Constitutes A "Person" Within The Meaning Of That Section.

Section 401(b), 47 U.S.C. Section 401(b) provides as follows:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money . . . any party injured hereby . . . may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of same, the court shall enforce disobedience to such order . . .

[21] *California and Public Utilities Commission of California, et al. v. FCC*, No. 84-889 (U.S. filed December 12, 1984). *Louisiana Public Service Commission v. FCC*, No. 84-871 (U.S. filed November 30, 1984). *Southwestern Bell Telephone Co. v. Arkansas PSC*, 584 F. Supp. 1087 (D. Ark.) rev'd 738 F.2d 901 (8th Cir. 1984) petition for cert. filed 53 U.S.L.W. 3290 (U.S. October 16, 1984, No. 84-483).

"Person" is defined for purposes of those provisions of the Communications Act regulating wire and radio communication by Section 153(i) as follows:

> "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation, . . .[22]

"State commission" is not listed within this definition. In fact, "State commission" is specifically defined by Congress in a succedent subsection.

> "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.[23]

The Fourth Circuit has equated a "State commission" as defined in 47 U.S.C. Section 153(t) to a "person" beyond the definition given in the preceding subsection (i). Neither the language nor the history of the Communications Act justifies this action. To include a State utility commission within the same class defined by the words "an individual, partnership, association, joint-stock company or corporation" "offends the traditional canon of statutory construction expanding the general terms beyond the specific words which follow."[24]

Furthermore, as determined by the U.S. District Court for the District of Vermont:

> The statutory scheme offers no suggestion that the provisions of 47 U.S.C. section 401(b) was designed to make injunctive relief available against a State regulatory agency at the instance of a regulated

[22] 47 U.S.C. Section 153(i).

[23] 47 U.S.C. Section 153(t).

[24] *New England Telephone Co. v. Public Service Board of Vermont,* 576 F. Supp. 490, 495 (D. Vt. 1984), *appeal pending,* No. 84-7051 (2d Cir. filed June 27, 1984).

> carrier who asserts it is aggrieved by the State ratemaking process.[25]

This Court must not ascribe an intent on the part of Congress to confer authority on the federal District Courts to enforce rulemaking decisions of the FCC against the state utility commissions "on the strength of an expanded definition of 'person' that clearly reaches beyond the language of section 3 of the Act [47 U.S.C. section 153(i)]."[26] The conclusion of the Fourth Circuit must therefore be rejected and the rationale put forth by the District Court for Vermont should be adopted by this Court.

CONCLUSION

For the reasons stated, certiorari should be granted in this case.

Respectfully submitted,

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[25] *Id.*

[26] *Id.* at 494.

APPENDIX A

United States Court of Appeals
for the Fourth Circuit

No. 83-1403

The Chesapeake and Potomac Telephone Company of Maryland,

Appellee,

v.

Public Service Commission of Maryland, Frank O. Heintz, Chairman, William A. Badger, Commissioner, Lilo K. Schifter, Commissioner, Wayne B. Hamilton, Commissioner, Haskell N. Arnold, Commissioner,

and

Ronald Hawkins, Executive Director and Maryland Office of People's Counsel,

Defendants.

Federal Communications Commission,

Amicus Curiae

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Senior District Judge. (C/A N-83-855)

Argued: December 9, 1983 Decided November 20, 1984

Before RUSSELL and MURNAGHAN, Circuit Judges, and MICHAEL,[1] District Judge

[1] Hon. James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation.

Kirk J. Emge, General Counsel for the Public Service Commission of Maryland (Sandra L. Hall, Assistant General Counsel on brief) for Appellants; D. Michael Stroud (Robert A. Levetown and Mark J. Mathis; David H. Lloyd, John A. Siliciano, Daniel I. Prywes, Arnold & Porter; J. William Sarver on brief) for Appellee.

PER CURIAM:

This is an appeal from an Order of the District Court granting a preliminary injunction requiring the Public Service Commission of Maryland (PSC) and its officials to comply with a Federal Communications Commission (FCC) Preemption Order dated January 6, 1983. Jurisdiction for this appeal is provided for in 28 U.S.C. § 1292(a)(1) (1982).

PSC argues on appeal that the District Court had no jurisdiction to grant the preliminary injunction, or alternatively that the District Court abused its discretion in granting the preliminary injunction. Prior to addressing those arguments, it is important to discuss briefly the FCC Preemption Order underlying this appeal.

The Preemption Order prescribed depreciation rates and depreciation methods for certain equipment used by telephone companies. The FCC initially indicated that the Preemption Order did not affect the authority of state utility commissions insofar as intrastate communications service was concerned. 89 F.C.C.2d 1094, 1108 (1982). Subsequently, the FCC reversed its position, stating that the Preemption Order completely preempted the authority of state utility commissions to regulate depreciation rates and methods for the specified telephone equipment. C. C. Docket No. 79-105, F.C.C. No. 82-581, slip op. (Jan. 6, 1983).

Notwithstanding the FCC's position regarding the Preemption Order, PSC concluded that the FCC-prescribed rates and methods would be inappropriate in

establishing intrastate depreciation rates. As a result, PSC decided not to comply with the Preemption Order in establishing depreciation rates sought by the Chesapeake and Potomac Telephone Company of Maryland (C&P).

In response to PSC's decision, C&P brought an action to force PSC to comply with the Preemption Order. As a part of that action, C&P obtained the preliminary injunction at issue here. The preliminary injunction required PSC and its officials to comply with the Preemption Order in establishing both interstate and intrastate depreciation rates and methods. The District Court granted the preliminary injunction until the resolution of *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir. June 18, 1984), an action then pending concerning the validity and effect of the Preemption Order. Although PSC immediately appealed the District Court's decision, we reserved judgment on PSC's appeal until resolution of *Virginia State Corporation Commission v. FCC*, due to the relationship between the two cases.

We subsequently ruled in *Virginia State Corporation Commission v. FCC*, that the Preemption Order was a valid and complete preemption of state regulation regarding interstate and intrastate depreciation rates and methods for the specified telephone equipment. Based on our ruling in that case, we now address PSC's appeal of the District Court's decision granting the preliminary injunction. PSC's appeal consists of two arguments which are considered separately below.

I.

PSC's first argument is that the District Court lacked jurisdiction under 47 U.S.C. § 401(b) to grant the preliminary injunction. That provision states:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appro-

> priate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

47 U.S.C. § 401(b) (1948). There are four points to PSC's argument that the District Court lacked jurisdiction under Section 401(b). First, PSC argues that the District Court lacked jurisdiction under Section 401(b) because PSC is not a "person" with the meaning of that section. This point is without merit because C&P's suit for preliminary injunction named not only PSC but also the officials comprising PSC as defendants. Thus, even if PSC is not a "person" within the meaning of Section 401(b), PSC's officials are expressly covered by that section.

Moreover, we believe that PSC must be considered a "person" within the meaning of Section 401(b). A contrary interpretation would undermine the Federal Communications Act by rendering PSC and other communications "entities" immune from enforcement actions by the FCC under Section 401(b). Therefore, we conclude that PSC's first point does not support its argument that the District Court lacked jurisdiction in this case.

Second, PSC argues that Section 401(b) did not provide the District Court with jurisdiction because the Preemption Order is not an "order" within the meaning of that section. Section 401(b) expressly covers only violations of FCC "orders". Relying on the distinction between administrative orders and rules stated in *CBS v. United States*, 316 U.S. 407, 418 (1942), PSC asserts that the Preemption Order is merely an administrative rule, and therefore outside the scope of Section 401(b).

Although PSC correctly cites *CBS v. United States* for the proposition that administrative orders and rules are distinguishable, we find that the Preemption Order is an "order" within the meaning of Section 401(b). Indeed, our ruling here is dictated by our analysis of the same Preemption Order in *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir. June 18, 1984).

As noted above, in *Virginia State Corporation Commission v. FCC*, we ruled that the Preemption Order was a valid and complete preemption of state regulation concerning depreciation rates and methods for the specified telephone equipment. That opinion did not explicitly state our jurisdictional basis for reviewing the Preemption Order. Nevertheless, our jurisdiction in that case clearly came from 47 U.S.C. § 402 (1982) because that section is the exclusive means by which this court can review orders such as the Preemption Order. Although *CBS v. United States* construed Section 402 to cover certain administrative rules and regulations, the express language of Section 402 only provides for review of FCC "orders". Since *CBS v. United States* was not discussed or mentioned in *Virginia State Corporation Commission v. FCC*, it is clear that our review of the Preemption Order in that case was based on the express language of Section 402. Thus, our analysis in *Virginia State Corporation Commission v. FCC* included an implicit ruling that the Preemption Order was an order, not a rule or regulation.

That implicit ruling dictates our ruling in the present case that the Preemption Order was an "order" within the meaning of Section 401(b). *Contra New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, No. 83-1779 (1st Cir. June 29, 1984). Thus, Section 401(b) did provide the District Court with jurisdiction to grant a preliminary injunction concerning the Preemption Order. As a result, we conclude that PSC's second point provides no support for its argument that the District Court lacked jurisdiction in this case.

Third, PSC argues that Section 401(b) did not provide the District Court with jurisdiction because that section cannot be construed as creating an implied private cause of action to enforce an FCC ruling. Obviously, this point is based on the assumption that the District Court did not have jurisdiction under Section 401(b) because the Preemption Order was not an "order" within the meaning of Section 401(b). Given our above ruling to the contrary, we conclude that PSC's third point is without merit.

Finally, PSC argues that the Johnson Act, 28 U.S.C. § 1342, is a bar to preliminary injunctions such as the one at issue here. The Johnson Act states that:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1342 (1942).

Although PSC argues that the Johnson Act is applicable to this case, we note that all the prerequisites for application of the Act were not satisfied here. The District Court's jurisdiction in granting the preliminary injunction was based on 47 U.S.C. § 401(b). As such, Section 1342(1) of the Johnson Act was not satisfied. Since the four prerequisites of the Johnson Act are conjunctive, PSC's failure to demonstrate that Section 1342(1) was met here renders the Johnson Act inapposite to the preliminary

injunction in this case. Therefore, PSC's fourth point does not support its argument that the District Court lacked jurisdiction to grant the preliminary injunction.

In sum, there is no support for PSC's first argument. As a result, we rule that the District Court had jurisdiction under 47 U.S.C. § 401(b) to grant the preliminary injunction at issue here.

II.

Given our ruling that the District Court had jurisdiction to grant the preliminary injunction, we must address PSC's second argument — that the District Court abused its discretion in granting the preliminary injunction.

In considering whether to grant the preliminary injunction, the District Court applied the standard articulated in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977). Accordingly, the District Court examined:

1. The likelihood that C&P would be irreparably harmed if the preliminary injunction were not granted;
2. The likelihood that C&P's customers would be irreparably harmed if the preliminary injunction were granted;
3. The likelihood that C&P would prevail on the merits of its action to force PSC to comply with the Preemption Order; and,
4. Whether the public interest would better be served by granting or denying the preliminary injunction.

PSC argues that the District Court's conclusion regarding each of the above factors was flawed in some way, and thus the District Court abused its discretion in granting the preliminary injunction.

First, PSC asserts that the District Court erroneously concluded that C&P would suffer irreparable harm if the

preliminary injunction were not granted. PSC does not contest the District Court's finding that not granting the preliminary injunction would cost C&P approximately $44,000 per day in lost revenues (i.e., revenues C&P would be receiving if PSC complied with the FCC-prescribed depreciation rates for intrastate ratemaking). However, PSC argues that C&P's loss would not have been irreparable because the District Court could have fashioned an equitable remedy to compensate C&P in the event that C&P prevailed on the merits.

We believe that the District Court correctly found that C&P's loss would have been irreparable. Maryland law provides no statutory device for recovering such a loss, and as PSC concedes, the loss could not have been offset by charging higher rates in the future. *Public Service Commission v. Baltimore Gas & Electric Co.*, 40 Md. App. 490, 393 A.2d 193 (1978); *Chesapeake & Potomac Telephone Co. of Maryland*, 32 Pub. Util. Rep. 3d (PUR) 470, 475 (Md. PSC 1960). Although PSC proposes a court-made equitable remedy, we note that there is no authority cited supporting that proposition nor has this court found any such authority. Since ratemaking in Maryland is reserved for the legislature, *Public Service Commission v. Baltimore Gas & Electric Co.*, 273 Md. 357, 329 A.2d 691, 694 (1974), we conclude that PSC's proposition is without merit. As such, we agree with the District Court that C&P would have suffered a substantial irreparable loss if the preliminary injunction had not been granted.

Second, PSC asserts that the District Court underestimated the harm to C&P's customers if the preliminary injunction were granted. PSC suggests that the preliminary injunction would force some customers to terminate their telephone service, but we do not believe such a result was likely. As noted by the District Court, the preliminary injunction resulted in an effective rate increase of one cent per day to C&P's customers. Furthermore, the rate increase was subject to a refund plus interest from C&P in the event that C&P lost on the

merits of its case against PSC. Given the small amount of the rate increase and the promised refund by C&P, we rule that the District Court correctly concluded that the loss to C&P's customers was not irreparable and was far outweighed by the substantial and irreparable loss to C&P if the preliminary injunction were not granted.

Third, PSC argues that the District Court incorrectly concluded that C&P was likely to prevail on the merits of its case against PSC. Obviously, the fact that the District Court correctly predicted the result in *Virginia State Corporation Commission v. FCC* seriously undercuts PSC's argument. In addition, however, we believe that the District Court had ample justification when it granted the preliminary injunction to conclude that C&P was likely to succeed on the merits. At that time, among courts which had considered the same issues as in this case, the majority position favored C&P's success on the merits. *Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission*, No. C83-214C (W.D. Wash. March 10, 1983), *appeal docketed* No. 83-3746 (9th Cir. April 7, 1984). *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, No. 83-557-A (M.D. La. June 27, 1983), *aff'd*, No. 83-3494 (5th Cir. Oct. 11, 1984); *Southwestern Bell Telephone Co. v. State Corporation Commission of Kansas*, No. 83-4125 (D. Kan. May 16, 1983), *appeal docketed*, No. 84-2296 (10th Cir. Sept. 13, 1984). *Contra, New England Telephone & Telegraph Co. v. Public Utility Commission of Maine*, Civ. No. 83-0166-P (D. Me. June 15, 1983), *aff'd* No. 83-1779 (1st Cir. June 29, 1984). Consequently, we believe that the District Court did not err in concluding that C&P was likely to prevail on the merits.

Finally, PSC asserts that the District Court erred in finding that the public interest would better be served by granting the preliminary injunction. Even if we agreed with PSC's assertion, where the first three *Blackwelder* factors favor granting a preliminary injunction, issuance of the preliminary injunction is proper, notwithstanding a

finding that the public interest would better be served by not granting the preliminary injunction. *Id.* at 196. Nevertheless, we believe the District Court correctly found that the public interest would better be served by granting the preliminary injunction. As noted by the District Court, the FCC operates under a Congressional mandate "to make available . . . to all the people of the United States a rapid, efficient, Nationwide, and world-wide . . . communications service with adequate facilities at reasonable charges . . ." 47 U.S.C. § 151 (1937). Since the FCC issued the Preemption Order in an effort to accomplish its Congressional mandate, we do not believe that the District Court erred in concluding that temporarily enforcing the Preemption Order would better serve the public interest. Thus, we dismiss PSC's final argument in support of its position that the District Court abused its discretion in granting the preliminary injunction.

In conclusion, we rule that there is no support for PSC's position that the District Court abused its discretion in granting the preliminary injunction. Given our ruling that the District Court had jurisdiction under 47 U.S.C. § 401(b) to grant the preliminary injunction, we hold that the District Court's decision must be

AFFIRMED.

APPENDIX B

United States District Court
District of Maryland

Civil Action No. N83-855

The Chespeake and Potomac Telephone Company of Maryland,

Plaintiff,

v.

Public Service Commission of Maryland,
Frank O. Heintz, Chairman,
William A. Badger, Commissioner,
Lilo K. Schifter, Commissioner,
Wayne B. Hamilton, Commissioner,
Haskell N. Arnold, Commissioner,

Defendants.

ORDER FOR PRELIMINARY INJUNCTION

(Filed 6th April 1983)

This cause came on for hearing of Plaintiff's Motion for Preliminary Injunction on Wednesday, April 6, 1983. The Plaintiff was represented by D. Michael Stroud, J. William Sarver and Donald N. Rothman. The Defendants were represented by Kirk J. Emge. Intervenor, the Maryland Office of People's Counsel, was represented by James H. DeGraffenreidt, Jr. The Court having reviewed the record herein and heard the oral arguments of counsel, finds and orders as follows:

1. This Court has jurisdiction to issue the injunction sought under 47 U.S.C. § 401(b).

2. The Johnson Act, 28 U.S.C. § 1342, is not a bar to this action.

3. The Plaintiff is entitled to a preliminary injunction and a preliminary injunction should issue.

4. Unless an injunction is issued, the Plaintiff will suffer irreparable harm inasmuch as neither Defendants nor this Court can authorize Plaintiff to recover retroactively any revenues lost during the pendency of the underlying cause of action on the merits.

5. No harm will accrue to the other parties to this proceeding or to the Plaintiff's ratepayers inasmuch as Plaintiff will place the rates at issue in effect subject to refund with interest and will refund any amounts so collected should the January 6, 1983, FCC Order in Docket 79-105 not be upheld on appeal. Collection of rates subject to refund with interest is adequate security under FRCP Rule 65(c).

6. The Court finds that it is in the public interest of ensuring compliance with the Congressional mandate of developing nationwide uniformity in telecommunications policy to enforce a binding FCC order regarding depreciation rates and methodologies while it is in effect.

7. Plaintiff has demonstrated a likelihood of prevailing on the merits of this case.

WHEREFORE, for the reasons stated, it is hereby ordered:

That a preliminary injunction issue against Defendants requiring them to abide by the FCC's January 6, 1983, Order regarding depreciation rates and methodologies until this action is finally resolved and, within ten (10) days of the date of this order, issue an order which provides for the collection of rates by Plaintiff sufficient to recover the intrastate revenue requirement resulting from the FCC-prescribed depreciation rates and methodologies.

These rates will be subject to reasonable refund provisions as the Defendant may authorize should Plaintiff not prevail on the merits of this case and which will

include provisions to make refunds to those customers who terminate service of the Plaintiff during the effective dates of the injunction.

Done, this 6th day of April, 1983.

EDWARD S. NORTHROP,
United States District Judge.

In The United States District Court
For The District of Maryland

Civil Action No. N-83-855

The Chesapeake and Potomac Telephone Company of Maryland

v.

Public Service Commission of Maryland
Ronald Hawkins, Executive Director,
Frank O. Heintz, Chairman
William A. Badger, Commissioner,
Lilo K. Schifter, Commissioner
Wayne B. Hamilton, Commissioner
Haskell N. Arnold, Commissioner

Northrop, Senior Judge

Filed: April 7, 1983

J. William Sarver, Esquire of Baltimore, Maryland; Mark H. Mathis, Esquire and D. Michael Stroud, Esquire, of Washington, D.C.; and Donald N. Rothman, Esquire of Gordon, Feinblatt, Rothman, Hoffberger, and Hollander, of Baltimore, Maryland, for plaintiff.

Kirk J. Emge, Esquire, Chief Hearing Examiner of Public Service Commission of Maryland, of Baltimore, Maryland, for defendant.

James H. DeGraffenreidt, Jr., Esquire of Baltimore, Maryland, for Intervenor, Maryland Office of People's Counsel.

MEMORANDUM

In this action the plaintiff, Chesapeake and Potomac Telephone Company of Maryland (hereinafter "C&P"), seeks a preliminary injunction preventing the Public Service Commission of Maryland and its executive director and commissioners (hereinafter "PSC") "from the operation, enforcement or execution of that portion of Order No. 66114 of the Maryland Public Service Commission that prevents plaintiff from collecting intrastate charges for telephone services based on depreciation rates prescribed by the Federal Communications Commission." Motion for Preliminary Injunction at 1-2. C&P alleges it is losing $44,000 per day as a result of that Order, causing it to suffer substantial and irreparable harm because regulatory law does not permit retroactive recovery of this revenue. It further contends that in the event the rate increase is later determined to be unjustified, its' customers can be protected through a refund of their excess contribution, with interest. C&P also suggests that a rate change of no more than 2.2% would result in its recovery of this revenue. The Maryland Office of People's Counsel (hereinafter People's Counsel), upon motion to this Court, was granted leave to intervene on April 6, 1983. The People's Counsel joins PSC in all substantive respects.

These proceedings had their genesis in an order of the FCC released January 6, 1983, in which the FCC reconsidered and revised its general position on the rate depreciation system in telecommunications. *See* Uniform System of Accounts, CC Docket No. 79-105, FCC 82-581 ("The Preemption Order") (Attachment A to Complaint). Today, it is the FCC's position that Section 220 of the Communications Act, 47 U.S.C. § 220, permits the FCC to preempt states insofar as the establishment of depreciation expense determinations. *See* Preemption Order

at 6. C&P, like other companies in the telecommunications industry, has been prescribed depreciation rates by the FCC which it intends to utilize. Nevertheless, because the PSC believes the FCC Preemption Order unlawfully infringes upon the State of Maryland's authority to set its own intrastate rates, it has declined to abide by the new FCC formula. *See* Order No. 66114 at 12-18 (entered Feb. 18, 1983) (Attachment B to Complaint). The PSC suggests "the depreciation practices established by the FCC in no way limit this Commission's authority to determine the appropriate level of depreciation expense to be reflected in intrastate rates for telephone service." *Id.* at 18.

Subject Matter Jurisdiction

Initially, the PSC opposes the plaintiff's request for a preliminary injunction on the grounds that this Court lacks subject matter jurisdiction. Memorandum of Law of Public Service Commission of Maryland in Opposition to plaintiff's Motion for Preliminary Injunction (hereinafter "Opposition") at 4-15. C&P disagrees and contends Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), confers jurisdiction upon this Court. That section reads as follows:

> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, to enjoin upon it or them obedience to the same.

The PSC objects to the applicability of that statute by emphasizing the statutory reference to failure or neglect of any "person" to obey any order of the FCC. *See* Opposition at 8-9. In the Communications Act, "person" includes "an individual, partnership, association, joint-stock company, trust, or corporation." 47 U.S.C. § 153(i). "State Commission" is defined separately, *see id.* § 153(t), and the PSC argues it is therefore not included in the definition of "person." *See id.* § 153(i).

Within the past month, another court faced and rejected this very argument. *See Pacific Northwest Bell Telephone Co. (PNB) v. Washington Utilities and Transportation Commission (WUTC)*, No. C83-214C (W.D. Wash. March 10, 1983) (hereinafter "PNB v. WUTC"). It held:

> 47 U.S.C. § 401 provides the only means through which the FCC or a private party can seek the enforcement of a valid FCC order or provision (There are some additional provisions elsewhere in the statute which specifically address the enforcement of orders against carriers by the FCC). §§ 401(a) and (c) are directed to the prosecution of violations of *provisions* of the chapter by the FCC and § 401(b) is directed to enforcement of FCC *orders*. Since § 401(b) is the only method by which anyone, including the FCC, could secure enforcement of its orders, the Court is inclined to believe that Congress intended this provision to apply to all violations. Although the Court recognizes the fact that Congress was very sensitive to the delicate balance of power as between the FCC and state commissions in the area of regulating communications, the Court believes that Congress addressed these concerns by providing ample provision for review of FCC orders. Congress could hardly have intended to allow a state commission to refuse the opportunity to seek review of a FCC order on the grounds that it was not a "person" within the meaning of the enforcement section of the statute.

> Rather, this Court finds that Congress intended FCC orders to be enforceable until suspended through proper process (§ 408). Further, the Court finds that there is no rational basis for excluding state commissions from the group of persons against whom enforcement may be sought since they clearly have the same opportunity as any other person to seek review and suspension of orders with which they disagree.
>
> Thus, the Court finds that there is jurisdiction under 47 U.S.C. § 401(b).

This Court likewise finds that a state commission is a person within the meaning of § 401(b). Accordingly, PSC's first jurisdictional argument must be rejected.

The second basis for PSC's challenge to this Court's subject matter jurisdiction is the Johnson Act, 28 U.S.C. § 1342. *See* Opposition at 10-15. It reads:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; *and,*
>
> (2) The order does not interfere with interstate commerce; *and,*
>
> (3) The order has been made after reasonable notice and hearing; *and,*
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

(Emphasis added). This Court has just held that jurisdiction may be predicated upon § 401(b). This Court therefore has federal question jurisdiction. Jurisdiction is not based solely on diversity of citizenship or repugnance of the order to the Federal Constitution. Accordingly, the

Johnson Act does not preclude subject matter jurisdiction here.

Preliminary Injunction Standards

In determining the propriety of a preliminary injunction in this case, the parties have agreed that the proper standard is the test articulated in *Blackwelder Furniture Company v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977). The factors of that test are as follows:

(1) the likelihood of irreparable harm to the company without the preliminary injunction;

(2) the likelihood that other parties will be irreparably harmed if an injunction is issued;

(3) the company's likelihood of success on the merits; and

(4) the public interest.

The first step, of course, is for the Court to balance the likelihood of irreparable harm to the plaintiff without an injunction against the likelihood of harm to the defendant with an injunction. *Maryland Undercoating Company, Inc. v. Payne*, 603 F.2d 477 (4th Cir. 1979). "If a decided imbalance of hardship should appear in the plaintiff's favor, it is enough that grave or serious questions are presented; plaintiff need not show a likelihood of success on the merits. The need for plaintiff to show likelihood of success on the merits increases as the probability of irreparable injury without an injunction decreases." *Id.* Finally, the public interest must be considered.

In *PNB v. WUTC, supra*, the Washington court noted that prior to consideration of these four factors, the court must determine whether the statutory preconditions of injunctive relief have been met. *See* slip op. at 9-10. Section 401(b) provides in pertinent part:

> If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process. . . .

The court found that there was no dispute that the Preemption Order at issue, the same order at issue in this case, was regularly made and that WUTC was duly served with a copy of the order. Slip op. at 9.

The Washington court then rejected WUTC's argument that it had not violated the Preemption Order because the order had not told it to do anything. *See* slip op. at 9. Like the PSC, WUTC contended that the Order did not limit its authority to determine depreciation expense. *See id.* at 9-10. The court also stated that the issue of FCC authority to preempt the entire field of depreciation charges was not before it because that issue was not subject to review in the district court. *See id.* at 10.

After making these preliminary determinations, the court held that a preliminary injunction was appropriate. It based its holding on a finding that PNB was forced to forego substantial revenues to offset expenses and that PNB could not retroactively recapture these revenues if it ultimately prevailed. The court noted that in the event PNB did not prevail, the rate increase could be refunded. *See id.* at 10.

Although the Washington Court found that the Preemption Order was "regularly made" the PSC and the People's Counsel suggest that the order presently at issue was not regularly made because the FCC was without authority. *See* Opposition at 29; Memorandum of Maryland Office of People's Counsel in Opposition to Motion for Preliminary Injunction (hereinafter cited as "Opp. of People's Counsel") at 14-15 It is more likely, however that the term "regularly made" refers to procedural regularity because jurisdiction over the issue of the validity of an FCC Order is vested exclusively in the Court of Appeals. *See* 28 U.S.C. § 2342(1). Procedural regularity has not been challenged.

Like the Washington Court this Court must consider irreparable injury to the utility if a preliminary injunction is not granted. C&P alleges that for this rate year alone, it will lose $16.1 million in revenues if the PSC does not follow the FCC mandated depreciation standard. C&P further alleges that under Maryland law there is no statutory device through which it could retroactively recover revenues after a determination in its favor. The PSC, along with courts in other jurisdictions has refused to allow such a retroactive recovery. *See* C&P's Memo at 6-8.

Therefore, in the absence of a showing that some other remedy is available which can safeguard this FCC mandated depreciation entitlement, this Court has no choice but to find C&P will suffer irreparable harm in the absence of an injunction. The People's Counsel's and the PSC's argument that this Court retains the equitable power to order the PSC to reimburse C&P through retroactive compensation must be rejected, as it is nothing more than an attempt to have this Court order the PSC to do what the legislature forbids.

Besides considering the harm to C&P if this preliminary injunction is not granted, the Court must also consider the harm other parties might suffer if the preliminary injunction is granted. In particular, the Court is concerned about the impact an injunction would have on the residents of Maryland. The PSC and the Peoples Counsel suggest that any increase, no matter how small, may cause some consumers to give up their phone service or forego the opportunity to acquire phone service, and thereby jeopardize their rapid access to emergency health services and police and fire protection. Inasmuch as the requested increase roughly translates into a penny per day, I find that argument untenable. No reasonable person will terminate their utility service for that amount of money.

Moreover, in the event the United States Court of Appeals for the Fourth Circuit rules the FCC exceeded its power in establishing uniform accounting principles, C&P has agreed to return all excess monies paid to its customers, with interest. The formula for that rebate would likely amortize the return over a reasonable period and should permit those individuals who paid the increased rate, but who subsequently terminated their telephone service, the opportunity to individually petition C&P for their refund.

As to the People's Counsel's suggestion that because the appellate process is unlikely to produce a definitive resolution of this issue before the divestiture is implemented, C&P will be left to make the refunds after having transferred away at below book value assets which enabled AT&T to benefit from the accelerated depreciation and, under these circumstances to the extent that the refund obligation proves burdensome to C&P, that burden could ultimately flow through to C&P ratepayers unless AT&T is somehow held responsible after divestiture along with C&P, Opposition of People's Counsel at 11-12, that is an accounting problem better left to C&P and the PSC. Furthermore, because the argument is speculative in nature, it cannot stand in the way of the injunctive relief requested.

On the issue of "public interest," this Court finds it in the public interest that the Congressional mandate that there be a nationwide uniformity in telecommunications policy be followed. To bifurcate that interest further, so as to accept the PSC's argument that the residents of Maryland have a separate overriding concern beyond the national interest would be to view the concept of public interest too narrowly.

Finally, the fourth factor which the Court must consider is whether C&P has demonstrated a likelihood of success on the merits. Exclusive jurisdiction over this issue has

been vested in the United States Court of Appeals. *See* 28 U.S.C. § 2342(1); *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir 1982). In fact, the issue is presently before the Fourth Circuit due to a suit filed by the Virginia utilities commission. *See Virginia State Corp. Comm'n. v. FCC*, No. 83-1136 (4th Cir., filed Feb. 11, 1983). Nevertheless, for the purposes of this decision, this Court must independently consider the issue.

In recent years, two separate panels of the Fourth Circuit upheld an FCC program of registration of telephone equipment used for both interstate and intrastate communications. *See North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (hereinafter cited as *NCUC I*); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977). The Fourth Circuit approvingly cited Chief Justice Burger's admonition that:

> the Communications "Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole."

NCUC I, supra, at 795-96. The PSC does not dispute that the telephone plant to be depreciated is used to provide both interstate and intrastate service. *See* Opposition. Accordingly, the Court finds there is a strong likelihood that the Fourth Circuit will uphold the Preemption Order.

For these reasons, a preliminary injunction should issue against the defendants requiring them to abide by the FCC's January 6, 1983 Order regarding depreciation rates and methodologies. This Court will not, however, accept C&P's conclusory averment that it is entitled to an automatic 2.2% rate increase. The PSC, not the Court, has the expertise in this area and will accordingly be required to issue an order within 10 days which provides for the collection of rates by C&P sufficient to recover the

intrastate revenue requirement as established by the FCC.

These rates will be subject to reasonable refund provisions as the PSC may authorize should C&P not prevail on the merits of this case. Finally, such refund provisions must include provisions to make refunds to those C&P customers who terminate service with C&P during the effective dates of the injunction.

EDWARD S. NORTHROP,
Senior United States District Judge.

April 7th, 1983

APPENDIX C

In The
United States Court of Appeals
For The First Circuit

No. 83-1779

New England Telephone and Telegraph Company, etc.,
Plaintiff, Appellee.

v.

Public Utilities Commission of Maine, et al.,
Defendants, Appellants.

Appeal from the United States District Court
for the District of Maine
[Hon. Gene Carter, U.S. District Judge]

Before Campbell, Chief Judge,
Breyer, Circuit Judge,
and Gierbolini,[2] District Judge.

William E. Furber, with whom Charles F. Dinghman, Cushing P. Samp, Joseph G. Donahue, Peter L. Murray, and Murray, Plumb & Murray were on brief, for appellants.

Francis X. Bellotti, Attorney General, and Charles R. Peck, Assistant Attorney General, Commonwealth of Massachusetts, Utilities Division, Public Protection Bureau, on brief for the Attorney General for the Commonwealth of Massachusetts, amicus curiae.

[2] Of the District of Puerto Rico, sitting by designation.

Robert A. Lewis, with whom Ralph I. Lancaster, Jr., Everett P. Ingfalls, and Pierce, Atwood, Scribner, Allen, Smith & Lancaster were on brief, for New England Telephone and Telegraph Company.

June 29, 1984

BREYER, *Circuit Judge*. In this case a private party seeks to enforce a decision of the Federal Communications Commission against a recalcitrant state utilities commission. The FCC promulgated a rule that required state public utility commissions to follow a certain method for calculating depreciation of telephone company equipment. The Public Utilities Commission of Maine ("the P.U.C.") evidently ignored the FCC rule. The private party, namely the New England Telephone Company, invoking the authority of section 401(b) of the Federal Communications Act, 47 U.S.C. § 401(b), obtained a federal district court injunction requiring the Maine commission to comply with the FCC rule. 570 F. Supp. 1558 (D. Me. 1983). Section 401(b) of the Act states that if anyone

> fails or neglects to obey any order of the [Federal Communications] Commission . . ., any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order.

We find that the word "order" in this statute does not include an FCC rulemaking decision of the sort here at issue. Thus, the district court lacked authority to issue the injunction.

I.

We start by examining the FCC decision at issue. The decision focused upon the question of how to recapture through depreciation charges the cost of a telephone company asset that has unexpectedly lost some of its anticipated economic value. (For a general description of cost recovery through regulated rate-setting, see *Distrigas*

of Massachusetts Corp. v. FERC, No. 83-1633 (1st Cir. June 14, 1984).) To take an oversimplified, imaginary example to illustrate the problem, suppose that the telephone company originally thought that some connecting equipment (say, a $50 fuse) installed in 1960 on the line between a house and a street pole would last fifty years. The company might initially depreciate the equipment at the rate of $1 per year. Suppose further that in 1980, after the company has recaptured $20 through depreciation charges, a new, dirt cheap, technological development makes it sensible to replace the fuse in 1985, instead of in the year 2010. How should the company recapture the remaining $30 of its original equipment cost? One depreciation method, called the "whole life" method, would have the company recalculate the annual depreciation charge for future years by dividing the original $50 cost by the newly estimated whole life of the asset (25 years). Thus, for the next five years, the company would charge $2 per year. By 1985, the company, then, would have recovered $30 of its $50 investment; the remainder would be recovered after the fuse was taken out of service. Another method, called the "remaining life" method, would have the company recalculate the annual depreciation allowance by dividing the remaining undepreciated cost of the fuse ($30) by its remaining useful life. So, the company would charge $6 per year for the years 1981 to 1985, recovering the total cost by the time the fuse was retired from service.

The economic implications of the choice between these methods are likely to be complex and may be of great importance. *See generally* Cornell, Pelcovits, & Brenner, *A Legacy of Regulatory Failure*, Regulation, July/Aug. 1983, at 37; Fogarty, *Capital Recovery: A Crisis for Telephone Companies, A Dilemma for Regulators*, Pub. Util. Fort., Dec. 8, 1983, at 13. The "remaining life" method, for example, apparently means that consumers will have to pay more in the near future, but less in the more distant future. Moreover, there are those who argue that in the newly deregulated telephone world, the foreseeably long-

term higher "phantom" depreciation charge resulting from the whole life approach (say, $2 extra per year from 1985 to 1995 to recover for the replaced fuse) could lead important customers to switch from the regular telephone system to other lower priced (but economically more costly) systems. If so, customer desertion could deprive the regular system of important sources of revenue and burden remaining customers with still higher charges.

Whether or not these concerns are accurate, the fact is that in 1980 the FCC announced that it would switch from "whole life" to "remaining life" depreciation methods. *In re Amendment of Part 31, etc.*, 83 FCC2d 267 (1980), *reconsidered*, 87 FCC2d 916 (1981). And in December 1982 it ruled that New England Telephone and certain other phone companies must use "remaining life" systems in setting their *interstate* rates. *In re Prescription of Revised Percentages of Depreciation, etc.*, 92 FCC2d 920 (1982). It expressly said, however, that it would determine the applicability of its choice of methodologies to *intra*-state rates (the subject now before us) in a "separate proceeding." *Id.* at 928-29.

The "separate proceeding" was a rule-making proceeding, which initially involved a different depreciation question, namely whether certain telephone assets should be depreciated or treated as current expenses. *In re Amendment of Part 31, Uniform System of Accounts, etc.*, Docket No. CC 79-105. The FCC concluded that some of the assets should be charged as current expenses, at least insofar as *inter*state rates were concerned. 85 FCC2d 818 (1981), *clarified as only affecting interstate rates*. 89 FCC2d 1094 (1982). Several phone companies then asked the FCC to reconsider whether it should not apply its rule to *intra*-state rates as well.

In the meantime, an Ohio telephone company asked the FCC for a "declaratory ruling" that the Commission's newly announced preference for a "remaining life" depreciation system applied to *intra*-state, as well as to

interstate, rates and preempted contrary preferences of state regulatory commissions. The FCC evidently believed that the Ohio case and the *Part 31* case reconsideration both involved the same general question, whether the FCC should require state commissions to apply FCC depreciation policies in intra-state ratemaking. Hence, it consolidated the two proceedings.

In January 1983 the FCC announced its decision in the (now consolidated) *Part 31* reconsideration. 92 FCC2d 864 (1983). It held that its methods for calculating depreciation were automatically binding upon the state commissions under the Communications Act, 47 U.S.C. § 220(b). It added that, in any event, even if the federal Act did not *automatically* preempt the right of state commissions to follow different depreciation methods for intra-state transactions, the Commission could (and did) forbid their doing so, for a nationally uniform depreciation policy was of great importance to a sound national communications policy. The Maine P.U.C. was not a party to the *Part 31* reconsideration proceeding, but some other state regulatory commissions were, and several of these commissions have appealed the FCC's ruling to the Fourth Circuit, where the case awaits decision. *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir.).

In April 1983, three months after the FCC's consolidated *Part 31* reconsideration decision, the Maine P.U.C. denied New England Telephone a rate increase in part because the increase rested upon the use of "remaining life" depreciation. The Maine commission decided that the FCC decision was unlawful — that the FCC could not tell it what depreciation methods to use. New England Telephone appealed the P.U.C.'s decision to the Maine Supreme Judicial Court, but it did not raise the "remaining life" issue in its appeal. Instead, it went to federal court, under 47 U.S.C. § 401(b), arguing that the Maine commission's defiance of the FCC was unlawful and should be enjoined. The federal district court agreed. The Maine P.U.C. now appeals its decision.

II.

The FCC decision at issue is the product of a rulemaking proceeding, namely the *Part 31* reconsideration. *See* pages 19-20 *infra*. The decision also fits the Administrative Procedure Act's definition of a "rule:" It is "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. § 551(4). Hence, we consider it to be a rule. And, we ask whether such a rule can also be considered an "order of the Commission" within the terms of section 401(b) of the Communications Act. We note that several other courts have been asked to enforce the preemptive effect of the FCC's *Part 31* reconsideration decision pursuant to section 401(b), and a number of them have granted the requested injunctions. *See Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, No. 84-1488 (8th Cir. June 7, 1984); *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 570 F. Supp. 227 (M.D. La. 1983); *Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission*, 565 F. Supp. 17 (W.D. Wash. 1983); *Chesapeake & Potomac Telephone Co. v. Public Service Commission*, 560 F. Supp. 844 (D. Md. 1983). But none of the courts granting injunctions, aside from the district court below, have directly addressed the question the Maine P.U.C. has raised here: whether the FCC's decision constitutes an "order" in the contemplation of section 401(b). We conclude that it does not, for several reasons.

First, the Administrative Procedure Act defines the word "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rulemaking*. . . ." 5 U.S.C. § 551(6) (emphasis added). Although this definition applies to the APA, enacted in 1946, and not necessarily to the Communications Act, enacted in 1934, the APA was the product of extensive study of pre-existing procedure. Some of its provisions — particularly those governing judicial

review — were largely declaratory of existing law. Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 Harv. L. Rev. 1823, 1829 (1978). And, post-APA statutes and rules typically incorporate the APA's concepts and distinctions. Thus, even if pre-APA statutes used the term "order" inconsistently, procedural coherence warrants reference to the APA's definitions as a starting point and their use as a guide in determining the proper construction of pre-existing, related procedural statutes — at least where other non-APA considerations also point clearly in the same direction. *See Kroeger v. Stahl*, 148 F. Supp. 403, 406 (D.N.J.) (using APA definition of "order" in interpreting 47 U.S.C. § 401(b), *aff'd* 248 F.2d 121 (3d Cir. 1957).

Second, to interpret section 401(b) more broadly — to apply it beyond the context of the "adjudicatory order" — threatens to interfere seriously with the well established principle that the "enforcement" of the Communications Act is "entrusted primarily to an administrative agency." *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950); *see Lechtner v. Brownyard*, 679 F.2d 322, 327 (3rd Cir. 1982) ("The focus of the Act is the general public, with the FCC, not the private litigant, as its champion."). Section 401, in relevant part, reads as follows:

> (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.
>
> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The first part, subsection (a), allows the *Commission* to ask a federal court to enjoin "a failure to comply with or a violation of any of the provisions" of the Act; the second part, subsection (b), allows a private person to require compliance with a Commission "order." Section 401(a) allows the Commission to decide precisely where and how to enforce the Act. Section 401(b) is consistent with the Commission's prerogatives under section 401(a) only if the term "order" is read to apply exclusively to those cases in which the Commission has previously considered and determined the specific rights and duties in question and where the private action seeks only to enforce the Commission's specific mandate. Only then would the Commission retain enforcement initiative, selecting a particular target for regulatory action and specifying the regulatory constraints that are to govern the target.

Third, to interpret "order" in section 401(b) broadly enough to encompass rules threatens the sound development of a coherent nationwide communications policy — a central objective of the 1934 Act. *See* 47 U.S.C. § 151; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Benanti v. United States*, 355 U.S. 96, 104 n.14 (1957). Rules are general in form and they can be highly general in content. *See, e.g., Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 418 (1942) ("Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all

to whom its terms apply."); *Precious Metals Associates, Inc. v. Commodity Futures Trading Commission*, 620 F.2d 900, 911 (1st Cir. 1980) ("Rulemaking proceedings are . . . designed to fill in the interstices of a statute.") (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) and *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973)); *PBW Stock Exchange, Inc. v. SEC*, 485 F.2d 718, 732 (3rd Cir. 1973) ("Rulemaking . . . characteristically involves . . . declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it."), *cert. denied*, 416 U.S. 969 (1974).

To apply a rule to particular cases often (though not always) requires not only adjudicatory fact finding, but also interpretation of the rule's scope and meaning. *See, e.g., Gardner v. Toilet Goods Association*, 387 U.S. 167, 193-98 (Fortas, J., dissenting) (1967); *Board of Trade v. Commodity Futures Trading Commission*, 704 F.2d 929, 932-33 (7th Cir. 1983). To construe 401(b) to include a private right to enforce commission rules would place this interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission. At best, responsibility for uniform policy would rest on the shoulders of an overworked (and inexpert) Supreme Court. The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy. And one need only look at the highly general language in which some Commission rules are stated to realize that this shift of power from Commission to courts is not merely a theoretical concern. *See, e.g.*, 47 C.F.R. § 21.3 (general principles of telecommunications licensing); 47 C.F.R. § 73.1920 (personal attack rule). There is no reason to believe that Congress intended an interpretation of 401(b) that could threaten such a shift or undermine the well established bar against private actions to enforce the Communications Act. *See, e.g., Lechtner v. Brownyard, supra; Massachusetts Universalist Convention v. Hildreth & Rogers Co., supra.*

Fourth, the Act's statutory review provisions can be read more fairly and coherently if 401(b) is construed narrowly. The normal way to obtain review of an FCC order is for a party to petition a circuit court of appeals. 47 U.S.C. § 402; *see, e.g., City of Rochester v. Bond*, 603 F.2d 927, 934-35 (D.C. Cir. 1979) (§ 402 as exclusive route to judicial review). Section 401(b) seems to foresee such review, for it discourages the district courts from re-examining the validity of the FCC "order" in question. It states that if, "after hearing, th[e] court determines that the order was regularly made and duly served," the court shall enforce obedience; this language suggests that the substantive validity of the order is not to be considered. *See Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, No. 84-1488 (8th Cir. June 7, 1984); *American Bond & Mortgage Co. v. United States*, 52 F.2d 318, 320 (7th Cir. 1931), *cert. denied*, 285 U.S. 538 (1932); *United States v. National Plastikwear Fashions, Inc.*, 123 F. Supp. 791, 793-94 (S.D.N.Y. 1954). This "split" of power between circuit and district courts (leaving 'review' to the first and 'enforcement against the disobedient' to the second) makes a degree of sense where an 'adjudicatory' order is at issue, for the 'disobedient person' in such a case was likely a party to the order and might have sought review of the agency decision in the circuit court. It makes far less sense and is far less fair in the case of an agency rule, which might well be enforced against persons not parties to the rulemaking proceeding. *Compare Yakus v. United States*, 321 U.S. 414 (1944) (administrative regulation can be enforced in proceeding which precludes review of validity of the regulation) *with Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978) (suggesting troubling nature of the *Yakus* holding and its limited reach) *and id.* at 289-90 (Powell, J., concurring) (same). The anomaly of such a restriction on proceedings to enforce rules would have been perceived still more forcefully in 1934, when 'pre-enforcement' review of rules was virtually non-existent — when the validity of a rule was typically first considered at the time of enforcement. *See, e.g., Federal Power Commission v. Metropolitan*

Edison Co., 304 U.S. 375, 383-85 (1938); Verkuil. *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185, 196-97 & n.55, 202-03 (1974). *Cf. Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 & n.20 (1970). And this fact makes it rather unlikely that Congress believed section 401(b) would apply to Commission rules.

Fifth, other sections of the Communications Act use the word "order" in a way that seems to envision Commission decisions requiring specific actions of specific carriers. *See, e.g.*, 47 U.S.C. §§ 201 (orders directing carriers to establish through services); 204 (orders concerning collection and refund of proposed increased rates); 205 (order directing carrier to cease and desist from charging unreasonable rates); 209 (order directing carrier to pay damages for violation of Act); 214(d) (order directing carrier to expand its facilities). With one exception, to which we shall turn shortly, we are unaware of any provision that uses the word "order" to refer to FCC interpretations of the Act or to FCC rules of general applicability. Indeed, section 416 of the Act, 47 U.S.C. § 416(a), provides that "[e]very order of the Commission shall be forthwith served upon the designated agent of the carrier. . . ." This language suggests that Congress assumed that "orders" took the form of specific directives to specific parties.

Sixth, to allow communications common carriers to enforce generalized FCC policy against state commissions through 'enforcement' suits in federal district courts threatens issue splitting and procedural complexity. New England Telephone, for example, might readily have raised the 'depreciation' problem in the Maine Supreme Judicial Court, where it obtained review of the rest of the P.U.C.'s rate decision in which the depreciation issue was embedded. Instead, it expressly withheld the issue from that proceeding, bringing it before the federal district court instead, thereby leaving the state court in the difficult position of trying to judge the reasonableness of certain of the P.U.C.'s determinations — the selection of a

rate of return fairly reflecting the risks to investors, for example — without considering the closely inter-related depreciation issue. The Maine courts were to review Hamlet without the Prince; the federal courts, the Prince without the rest of the play. Since the supremacy clause of the federal Constitution requires the Maine courts to apply federal communications law where appropriate, we see no reason to read the statute to encourage this form of fractionated review.

III.

Before concluding, we consider three arguments in New England Telephone's favor:

First, in *Columbia Broadcasting System v. United States, supra*, the Supreme Court interpreted the word "order" in 401's neighboring section, section 402, to encompass agency rules promulgated after rule-making proceedings. Thus, our interpretation requires reading the same word differently in the two sections. While we recognize the force of the argument calling for a similar construction, *see, e.g., Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Firestone v. Howerton*, 671 F.2d 317, 320 & n.6 (9th Cir. 1982), we find sufficient difference in the functions of the two sections to justify assigning a different scope to the same word in the two settings. *See, e.g., United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1184-85 (6th Cir. 1982), *aff'd*, 104 S. Ct. 575 (1984); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 461 n.230 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

Section 402(a), which the *CBS* Court considered, concerns judicial review of FCC decisions. It states

> Any proceeding to enjoin, set aside, annul, or suspend any *order* of the Commission under this chapter (except those appealable under subsection(b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

47 U.S.C. § 402(a) (emphasis added); *see* 28 U.S.C. § 2342 ("The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final *orders* of the Federal Communications Commission made reviewable by section 402(a) of title 47. . . .") (emphasis added). *CBS* concerned the FCC's Chain Broadcasting Regulations, which told broadcasting stations in part how they were to deal with the networks. CBS argued that the Court should review the regulations' lawfulness, despite the absence of any enforcement order based on the regulations. If it had to wait until the regulations were enforced to secure judicial review of their validity, it might have to wait forever, CBS said, for the stations intended to obey the regulations, to CBS's detriment. Thus, to interpret "order" in section 402 to apply only to the outcome of an adjudicatory enforcement proceeding would deprive those who might be seriously injured by others' obedience to an FCC rule of any opportunity to challenge the rule's legal validity. The Court agreed. And it considered the regulations to have sufficiently serious and immediate impact to warrant pre-enforcement review of their lawfulness. Accordingly, rules were swept within the scope of section 402's reference to "any order."

As this statement of the issues in *CBS* reveals, the policy concerns relevant to a proper interpretation of the word "order" in section 402 involve fundamental principles of judicial review and fair treatment. These concerns point towards a broad interpretation of the word in section 402, but no such considerations are at issue in the case of section 401. To the contrary, private parties have no inherent right to enforce FCC rules, and, as we have remarked above, considerations of fairness favor, if anything, a narrow construction of section 401's reference to "any order." In the absence of some strong policy reason favoring a broad interpretation of "order" in section 401, the various considerations previously discussed seem sufficient to outweigh the importance of linguistic uniformity among *different sections* of the statute.

Second, New England Telephone denies that the FCC decision here at issue was embodied in a "rule;" rather, it contends we should consider it as an adjudicatory order. The decision was called a "Memorandum Opinion and *Order*" (emphasis added); and it was issued as a "declaratory order" pursuant to 47 C.F.R. § 1.2 (authorizing the Commission to issue declaratory rulings, in accordance with section 5(e) of the APA, 5 U.S.C. § 554(e)). As the Supreme Court has said, however, "[t]he particular label placed upon [a decision] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc. v. United States,* 316 U.S. at 416. The FCC commonly adopts rules in opinions called "orders." *See, e.g.,* 47 C.F.R. § 1.429(i); *Columbia Broadcasting System, Inc. v. United States,* 316 U.S. at 425. And, in this instance, the proceedings that led to the decision were "properly treated by the FCC as rule making proceedings under 47 C.F.R. §§ 1.399-1.429." 570 F. Supp. at 1571. The FCC has confirmed that the decision "was adopted as part of a rulemaking docket." Memorandum of Federal Communications Commission as Amicus Curiae at 16. There is no indication that anyone followed adjudicatory, rather than rulemaking, procedures.

The temptation to refer to the FCC's deliberations as an "adjudicatory proceeding" that led to a "declaratory order" arises from the FCC's consolidation of the pure *Part 31* rulemaking proceeding with GTE of Ohio's declaratory action against the Ohio Public Utilities Commission. The latter action — entitled "Petition for Declaratory Ruling" — might perhaps be regarded as adjudicatory, despite its consolidation into a rulemaking proceeding. But even if its culminating order was regarded as enforceable under 401(b), it would be enforceable against the Ohio P.U.C., not the Maine P.U.C., which was not a party to the declaratory action. (Nor for that matter was the Maine Commission a party to the Part 31 proceeding with which the Ohio proceeding was consolidated.)

Third, New England Telephone points to the importance of the policy that the FCC is trying to vindicate with its effort to enforce uniform national depreciation rules. The threat of uneconomic bypass of the existing telephone system is arguably serious and may well justify regulatory decision-making by a single national authority. Moreover, New England Telephone suggests that the FCC's authority to impose preemptive nationwide rules is obvious. *See, e.g., Computer & Communications Industry Association v. FCC,* 693 F.2d 198, 214-18 (D.C. Cir. 1982), *cert. denied,* ___ U.S. ___ (1983); *North Carolina Utilities Commission v. FCC,* 537 F.2d 787 (4th Cir.), *cert. denied,* 429 U.S. 1027 (1976). Thus, it believes the Maine commission is acting contrary to clear law. Assuming, for the sake of argument, that all this is true, however, why must section 401(b) offer the only remedy? The federal courts are currently considering the substantive arguments concerning the FCC's authority. *Virginia State Corporation Commission v. FCC, supra.* Is it not reasonable to assume that the Maine commission and the Maine courts will read the decision? And, in the meanwhile, does New England Telephone not have a remedy sufficient to ameliorate any serious threat to the national telephone network through section 401(a); can it not ask the Commission to bring an enforcement action if the threat is truly serious? Finally, why can it not obtain an adjudication from the FCC against the Maine commission, through the same declaratory ruling procedure employed by GTE of Ohio, and *then* enforce the resultant order under 401(b) if necessary? Of course, in the process, the FCC likely will have to decide how important it is to vindicate New England Telephone's position. But this agency check permits assurance that New England Telephone's claim of public importance is correct, a determination that is properly left in the first instance to the FCC.

In sum, we conclude that New England Telephone cannot bring this case in federal court under the authority of section 401(b).

The injunction is vacated and the case is remanded to the district court with instructions to dismiss the action.

APPENDIX D

Before the Federal Communications Commission

Washington, D.C. 20554

83-855
FCC 82-581
32609

CC Docket No. 79-105
RM-3017

In the Matter of

Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's Rules and Regulations with respect to accounting for station connections, optional payment plan revenues and customer provided equipment and sale of terminal equipment.

Petition for Declaratory Ruling on Question of Federal Preemption Involving Order Of the Public Utilities Commission of Ohio in Conflict with (i) FCC Prescriptions Under Section 220 of the Communications Act and (ii) Established FCC Policies.

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1982

Released: January 6, 1983

By the Commission: Commissioner Fogarty issuing a separate statement.

1. The Commission has before it a Petition for Reconsideration filed on June 7, 1982, by the American Telephone and Telegraph Company, on behalf of itself and the associated Bell System Operating Companies (AT&T).

AT&T seeks reconsideration of the Commission's decision in *Amendment of Part 31,* 89 FCC2d 1094 (1982) (hereinafter cited as *Preemption Order*), in which the Commission determined that Sections 220(a) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. 220(a) and 220(b), did not preempt state commissions from applying different accounting and depreciation procedures for purposes of intrastate ratemaking proceedings.[3] The *Preemption Order* was a reconsideration of *Amendment of Part 31,* 85 FCC2d 818 (1981) (hereinafter cited as *Expensing Order*).

2. The Commission also has before it a Petition for Declaratory Ruling filed on June 7, 1982, by General Telephone Company of Ohio (GTE of Ohio). This petition requests that the Commission preempt an order of the Public Utilities Commission of Ohio (Ohio) that denied GTE of Ohio the same depreciation rates for intrastate purposes as had been prescribed by this Commission. GTE of Ohio contends that Section 220(b) established the rate prescribed by the Commission as the only depreciation rate the company could utilize.

3. The Commission established a joint reply period for the two petitions, utilizing the pleading cycle for comments in response to the Petition for Reconsideration, and allowed parties to cross-reference their pleadings where appropriate. In addition to pleadings filed by the petitioners and the GTE parties, comments or reply comments were filed by the Arkansas Public Service Commission (Arkansas), Ohio, the People of the State of California and the Public Utilities Commission of the State of California (California), the Virginia State Corporation Commission

[3] On June 8, 1982, GTE Service Corporation, on behalf of itself, United Telephone System, Inc., and Continental Telecom, Inc. (hereinafter referred to as GTE), filed a Petition for Clarification of the Commission's *Preemption Order*. This petition was dismissed as untimely. *Amendment of Part 31,* Mimeo No. 4766 (released June 24, 1982). However, the Commission stated that it would consider the substance of the petition in connection with AT&T's petition.

(Virginia), the National Association of Regulatory Utility Commissioners (NARUC), the United States Independent Telephone Association (USITA), the Office of Consumers' Counsel, State of Ohio (Consumers' Counsel), the United Telephone System Inc. and the Idaho Public Utilities Commission (Idaho). A summary of the comments is contained in Appendix A. Below we consider the issues raised on reconsideration, after which we shall consider the question presented by GTE of Ohio's Petition for Declaratory Ruling.

I. *Background*

4. In *Docket No. 19129*, 64 FCC2d 1, 54-56 (1977), we concluded that it would be desirable to have the causative rate payer bear the costs associated with station connections. We directed AT&T to file a plan for accomplishing this objective. Following AT&T's submission we initiated this proceeding, albeit with a somewhat different approach for modifying the accounting for station connections than proposed by AT&T.

5. After reviewing the comments, we concluded that the drop, block and protector portion of station connections should not be included in any accounting or regulatory revisions. We also concluded that our objective of placing the costs of station connections on the cost causative customer could not be achieved by means of an accounting change alone. This is so because associated with the provision of inside wiring must be apportioned between the federal and state jurisdictions as long as inside wiring is provided as a tariffed service subject to dual jurisdiction. Complete unbundling could be achieved by requiring inside wiring to be provided on a detariffed basis, as was done with customer premises equipment. Accordingly, we initiated a further inquiry to explore the detariffing concept further, *Amendment of Part 31*, 86 FCC2d 885 (1981).

6. Nevertheless, we concluded that changes in accounting and depreciation procedures that would begin ex-

pensing the inside wiring portion of the station connection account would be in the public interest, and would facilitate the deregulation of the provision of inside wiring if the Commission should later decide to take that approach. The principal changes required that future costs of installing inside wiring and similar costs be included as an expense in Account 605, Repair of Station Equipment. Such costs were previously capitalized in Account 232, Station Connections. The expensing of these costs would be phased in over a four year period unless a carrier obtained state commission approval to expense one hundred percent immediately. The *Expensing Order* also required that the present net investment in inside wiring and the investment capitalized during the phase-in period be amortized over a ten year period. These expensing and amortization rules replaced the depreciation procedures that had previously applied to the inside wiring portion of the station connections account.

7. On reconsideration, we concluded that the *Expensing Order* was not intended to preempt state commissions from utilizing other depreciation or accounting procedures for intrastate ratemaking proceedings, unless such preemption occurs as a matter of law. Our discussion was based in part on an assumption that most or all of the state commissions would follow our lead. We also indicated that Section 220 does not preclude state commissions from departing from accounting and depreciation rules prescribed by this Commission for purposes of regulating intrastate communications services. In reaching this conclusion, we reviewed Section 20(5), the Interstate Commerce Act predecessor of the accounting and depreciation provisions contained in Section 220. We concluded that nothing in the history of Section 20(5) provided any indication of whether that provision had been intended to preempt state commissions from prescribing divergent depreciation rates when the Interstate Commerce Commission (ICC) had prescribed a rate. We stated:

> [i]nasmuch as Section 20 had never been construed to restrict state commissions from requiring car-

> riers to keep additional records for purposes of intrastate ratemaking and court decisions in analogous contexts did not adopt an expansive interpretation of that provision, the reenactment of that language should not be interpreted to restrict state commissions from keeping such additional records in the absence of clear evidence that the 1934 Congress intended to produce that result.

Preemption Order, supra, at 1102.

8. We also reviewed the legislative history of the Communications Act and concluded that Congress had been uncertain of the preemptive effect of reenacting the Interstate Commerce Act language and that it apparently did not want to resolve the question at that time. We concluded that Congress had been attempting to obtain as much uniformity as possible without coercing any state commission to use ratemaking methods which it might find unacceptable. We found that we had proceeded in a manner consistent with this purpose for nearly four decades, noting that we had recognized divergent practices by state commissions from time-to-time. The language of Section 2(b)(1) was found to support the interpretation that state commissions are not precluded from applying different accounting and depreciation procedures from this Commission. The *Preemption Order* concluded by finding that nothing in the Act precluded us from preempting state commission actions that might interfere with or tend to frustrate policies or rules we have adopted to carry out statutory objectives with respect to interstate or foreign communications, but we also found that federal regulation would not be frustrated if carriers maintain additional records for intrastate ratemaking purposes.

II. *Discussion*

9. The question presented in the reconsideration petition is a clearly delineated controversy over whether Section 220(b) preempts state depreciation prescriptions that are inconsistent with the rates prescribed for classes of property by this Commission, or, whether Section

2(b)(1) or Section 221(b) reserve to the states the right to prescribe their own depreciation rates for intrastate regulatory purposes. Alternatively, it is argued that the Commission should preempt inconsistent state depreciation rates pursuant to its authority to preempt state actions which would frustrate or interfere with the accomplishment of federal objectives. *See North Carolina Utilities Commission v. FCC,* 537 F.2d 787 (4th Cir. 1976), *cert. denied,* 429 U.S. 1027 (1976) (hereinafter cited as *NCUC I*). The *Preemption Order* was the first time the Commission had squarely addressed the preemptive effect of a prescribed depreciation rate, despite having prescribed rates for more than thirty years. No federal court has addressed the question of the preemptive effect of a Commission prescribed depreciation rate.[4]

10. It is argued that the Commission erred in the earlier decision by concentrating on Sections 220(a) and 220(g) rather than properly analyzing Section 220(b), the provision dealing directly with depreciation. A careful review of AT&T's and GTE's pleadings and a thorough reevaluation of the entire question of the Commission's depreciation jurisdiction leads to the conclusion that the evaluation in the *Preemption Order* did not sufficiently consider the effect of Section 220(b). Accordingly, we shall undertake to evaluate anew the scope of the Commission's jurisdiction under Section 220(b).

11. Before turning to the analysis of the statutory provisions, it is necessary to understand the relationship between capitalizing and expensing a transaction or economic event. When an event is capitalized, its cost is recorded on the company's books to be recovered over some future period through depreciation charges to operating

[4] The United States Supreme Court has held that state commissions may prescribe depreciation rates where the empowered federal commission has not prescribed rates. *Northwestern Bell Telephone Co. v. Nebraska State Railway Comm.,* 297 U.S. 471 (1936). The Court specifically reserved judgment on the effect of prescribed rates by the federal commission.

expense. Depreciation as used here is an accounting convention for allocatively spreading the original cost, less net salvage, over the useful life of a capital asset. Thus, for there to be depreciation there must be costs that are to be recovered over more than one accounting period. However, when the decision to expense is made, all costs are to be recovered at one time. Thus, the decision to expense is a determination that there is no category of asset for which depreciation expense will be allowed. It is therefore clear that the decision to commence expensing the inside wiring portion of station connections involves questions of depreciation policy.

12. The law is clear that federal regulation should not be presumed to preempt state regulations without clear evidence of either congressional design to preempt the field or that state regulatory activities would obstruct the accomplishment and execution of the full purposes and objectives of Congress. *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141 (1963), *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Our review reveals that both criteria are satisfied in this case. In reaching this conclusion we analyzed the language of Section 220, the legislative history, relevant court cases, and our regulatory objectives.

A. *Statutory Language*

13. The Commission's express jurisdiction with respect to depreciation is set forth in Section 220(b). That section provides:

> The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the

> Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefore by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

14. The plain language of the statute is express and unequivocal. Section 220(b) says the Commission "shall" make depreciation prescriptions, and that carriers "shall not" charge depreciation different than that prescribed by the Commission. That this preempts inconsistent state action is further indicated in Section 220(h) which gives the Commission discretion to "except" carriers from the requirements of Section 220 "where such carriers are subject to state commission regulation."

15. The requirement of Section 220(i) that states be given an opportunity to comment before the Commission prescribes "any requirements as to accounts, records and memoranda" is consistent with an interpretation that states are preempted when the Commission has acted in the depreciation area. By providing that states be given notice, Congress ensured that state needs for accounts, records and memoranda brought to the Commission's attention would be considered. Such a procedure assures that the states' needs and legitimate interests are met.

16. In setting the duties of the Commission and the prohibitions on the carriers subject to the Act, Congress spoke of depreciation in general terms without any attempt to make distinctions between either "intrastate" or "interstate" property. This is significant because when Congress wanted to make such distinctions in the Act it

did so. See, *e.g.*, 47 U.S.C. 221(c) and (d), and 410(c). The fact that Congress did not make such a distinction here indicates that it intended no distinction.

17. Taken as a whole, the language of Section 220 appears clearly to preempt the states in connection with depreciation expense determinations and the related accounting. The language strongly implies that the states may not depart from depreciation rules prescribed by the FCC unless the Commission in its discretion allows them to do so. Otherwise, the federal statute would govern state depreciation practices in form only, allowing the states to treat substantive depreciation matters as they might choose. While that might be a plausible construction of Section 220, after full analysis we do not believe that Congress intended such a feeble gesture. There would be little purpose to require the carriers to keep all their books pursuant to an FCC prescription, and then allow the states to require the carriers to follow inconsistent depreciation practices. Instead, the language of the section and the comprehensive treatment given to this matter by the Congress demonstrate that more was intended. Accordingly, we find that the statutory language indicates that FCC depreciation prescriptions are to be followed in both the federal and state jurisdictions unless the FCC provides otherwise. As demonstrated below, this construction is also consistent with the legislative history.

B. *Legislative History*

18. In the *Preemption Order* we found that the legislative history of Section 220 was inconclusive and at most indicated that Congress was "not sure" about the preemptive effect of the new legislation. 89 FCC2d at 1106. However, the reconsideration petition and comments supporting it show that Congress believed that the language ultimately adopted would preempt the states from prescribing depreciation rates for subject carriers when the Commission had prescribed rates.

19. In our *Preemption Order*, we observed that Section 220 of the Communications Act had been adopted from

Section 20 of the Interstate Commerce Act, and our review of the few ICC cases touching upon preemption did not reveal the ICC to have possessed the kind of broad preemptive power now urged by GTE and AT&T. However, after reviewing the pre-1934 cases again, we find that, while not dispositive, they lean more toward GTE and AT&T's views than against them.

20. The closest the ICC came to delineating its position on this matter came in *Depreciation Charges of Telephone Companies*, 118 I.C.C. 295, 332 (1926), where it said:

> It seems to be well established that where a local telephone company undertakes to originate or deliver toll messages, and most of them do so undertake, practically all of its property is open for use in interstate commerce and at any time may be so used. Under such circumstances, no doubt would seem to exist as to the power of Congress to regulate the accounting practices of such companies with respect to their property, including the accounting for depreciation.

In the *Preemption Order* we focused on the fact that the ICC had not actually prescribed depreciation rates and thus there was uncertainty regarding the ICC's actual authority. However, after reviewing that case again we find that the better and more sensible interpretation is that if the ICC had prescribed depreciation rates, the state commissions would have been precluded from prescribing rates that diverged from those it prescribed. We cited *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 159 (1930), in the *Preemption Order* as supporting our conclusion that the ICC decision did not preempt the states. In that decision the Supreme Court held that absent ICC action prescribing depreciation rates, Section 20(5) did not preclude states from prescribing depreciation rates. Since the ICC proceeding did not actually prescribe depreciation rates, but only began a proceeding looking toward the ultimate prescription of depreciation rates, there were no depreciation rates prescribed that could have preempted state-prescribed depreciation rates. Thus *Smith* only

stands for the proposition that until the ICC actually prescribed rates, there was no basis for preempting the states. It did not reach the question of whether Section 20(5) would preempt the states if the ICC prescribed depreciation rates.[5]

21. At the hearings pertaining to the Communications Act the then chairman of the ICC indicated his belief that the ICC depreciation rulings would govern both federal and state depreciation practices:

> Paragraph (j) . . . should be most carefully considered. It unquestionably directly conflicts with, and destroys the unformity of systems of accounts and depreciation accounting required by the preceding provisions of the section. That is not true under the present law.[6]

22. Other witnesses who appeared at the hearings repeated the same view. See statements of Mr. Gifford,[7] Mr. Benton,[8] and Dr. Irvin Stewart.[9]

23. The *Preemption Order* relied heavily on the "silence contained in the Congressional Reports," 89 FCC2d 1105,

[5] Similarly, *Interstate Commerce Commission v. Goodrich Transportation Co.*, 224 U.S. 194 (1912) and *Kansas City Southern Ry. Co. v. I.R.S.*, 52 F.2d 372 (8th Cir. 1931) do not appear to have any pertinance to the issue at hand. As noted in 89 FCC2d at 1099, *Goodrich* did not raise any question with respect to the effect of ICC accounting rules upon activities not subject to ICC rate regulation. The *Kansas* holding simply reconciles two federal statutes, the Internal Revenue Code and the Interstate Commerce Act. It did not purport to establish new law on state preemption.

[6] Ltr. of F. McManamy, Hearings on S. 2910, p. 208.

[7] Hearings on H.R. 8301, pp. 191-192 (See 89 FCC2d at 1105, fn.17). The *Preemption Order* had indicated that Mr. Gifford's preemption views were tentative. However, careful review of that testimony reveals that Mr. Gifford's uncertainty may have concerned the date Section 20(5) was enacted, not preemption.

[8] Hearings on S. 2910, 73rd Cong., 2d Sess., p. 181 (1943).

[9] Hearings on H.R. 8301, 73rd Cong., 2d Sess., p. 17 (1934).

in concluding that the legislative history did not support a finding that Section 220 was intended to preempt state commissions from prescribing their own depreciation rates for intrastate purposes. However, a reexamination of the legislative history in light of the comments on reconsideration indicates that the committee reports accompanying the bills did contain language indicating that the committees believed that the predecessor provision had preempted the states. The House Report, in discussing the Section 220(j) provision (which was not adopted) that would have reserved jurisdiction over depreciation rates to the states for purposes of intrastate ratemaking, stated that the provision was "responsive to the requests of the State commissions that the present law be *changed so as to permit* those bodies to exercise, for State purposes, certain jurisdiction over . . . depreciation accounting."[10]

24. In remarks on the House floor, Representative Rayburn, Chairman, House Committee on Interstate and Foreign Commerce explained Section 220 of the proposed bill as follows:

> [p]aragraphs (a) to (g), relating to accounts records, memoranda, and depreciation, is based upon sections 20(5) to (8) of the Interstate Commerce Act with *changes necessary to permit State commissions to prescribe* the systems of accounts for the intrastate operation of carriers. Paragraphs (h) to (j) are new . . . *paragraph (j) removes any limi-*

[10] H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 7 (1934) (emphasis added). The section (j) proposed by the House would have provided: "Nothing in this section shall (1) limit the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction with respect to any carrier the percentage rate of depreciation to be charged to any class of property of such carrier, or the composite depreciation rate, for the purpose of determining charges, accounts, records, or practices; (2) relieve any carrier from keeping any accounts, records, or memoranda which may be required to be kept by any State commission in pursuance of authority granted under State Law." H.R. 8301, 73rd Cong., 2d Sess. Section 220(i) (February 27, 1934).

tation upon the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction, rates of depreciation. The last three paragraphs named were placed in the bill at the request of the State commissions which feel that their task of regulating intrastate communications will be greatly facilitiated by the adoption of these paragraphs.[11]

25. The Senate version of Subsection (j) took a totally different approach than the House version. It called "for investigation and report to Congress instead of immediately turning over these matters to the State." S. Rep. No. 781, 73rd Cong., 2d Sess. 5 (1934).[12] The version of Section 220(j) finally enacted was the result of agreement in the conference committee. The conferences agreed to adopt the House provisions as to Sections 220(h) and (i), but decided against the House Section 220(j) proposal to remove any limitation upon the power of states to prescribe rates of depreciation. Instead, Section 220(j) was modified along the lines of the Senate proposal to require the Commission to "investigate and report to Congress as to the need for legislation to define or further harmonize the powers of the Commission and of State commissions with respect to other matters to which this section relates." Conf. Comm. Rep. No. 1918, 73rd Cong., 2d Sess. 17 (1934). The obvious inference to be drawn is that the conferees were not prepared at that time to allow the states to prescribe

[11] 78 Cong. Rec. 10314 (1934) (emphasis added).

[12] The Senate version of Section 220(j) provided: "The Commission shall investigate and report to the Congress whether in its opinion legislation is desirable (1) authorizing the Commission to except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates; and (2) permitting the State commissions, in pursuance of authority granted under State Law, to prescribe their own percentage rates of depreciation or systems of accounts records, or memoranda to be kept by carriers." S. 3285, 73rd Cong., 2d Sess. Section 220(j) (March 28, 1934).

depreciation rates different than those established at the federal level, but that matter might be considered later if the report required by Section 220(j) indicated it to be appropriate.

26. The hearing testimony and Committee reports therefore indicate that the language being recodified from Section 20(5) of the Interstate Commerce Act preempted the state commissions' jurisdiction over depreciation. The rules of statutory construction provide that where Congress reenacts a provision from an existing statute, it intends that the construction applicable to the existing provision apply as well to the new provision.[13] The legislative history thus supports the actual language of Section 220(b) and indicates that Congress intended to preempt state commission jurisdiction over depreciation rates for subject carriers when it recodified the language from the Interstate Commerce Act. Accordingly, we conclude that the analysis of the legislative history contained in the comments of AT&T and GTE accurately represents the intent of Congress and that the more persuasive reading of the legislative history supports the construction that Section 220(b) preempts inconsistent state action where the Commission has prescribed depreciation rates for a carrier.

C. *Administrative and Court Decisions*

27. The *Preemption Order* cited *Accounting Rules for Telephone Companies,* 203 ICC 13 (1934), as evidence that the FCC could not preempt state depreciation practices. There the ICC recognized that states might have additional accounting needs and indicated that it had permitted state-prescribed [illegible] accounts within the federally-required books of accou[illegible]. However, the adoption of a blanket subdivision rule does not lead to the conclusion that federally adopted accounting and de-

[13] Courts have given weight to interpretations of the Interstate Commerce Act in interpreting the Communications Act. See, *e.g., American Telephone and Telegraph Company v. FCC,* 487 F.2d 865 (2d Cir. 1973).

preciation rules are not preemptive. Rather, it reflects an awareness that state commissions may have special data requirements to properly administer their regulatory policies which may require additional detail beyond that prescribed by the federal agency. A subdivision rule, however, does not permit what is accounted for as an expense to be capitalized in the guise of subdividing an expense account. While we may allow subdivisions of accounts, we will not allow inconsistent accounting or depreciation methods unless such practices are otherwise consistent with the public interest. Any other policy would obliterate the prescriptive effect of our adoption of a uniform system of accounts.

28. In fact we have approved variations from the prescribed uniform system of accounts. For example, our rules give carriers blanket authority to subdivide certain prescribed accounts "provided such subdivisions do not impair the integrity of the accounts prescribed." 47 C.F.R. 31.01-2(d)(1). C.F. 31.01-2(f), authorizing carriers to subdivide accounts "in the manner ordered by any state commission having jurisdiction. . . ." We also have approved state commission rate making treatment of plant under construction different from that adopted by us. See 89 FCC2d at 1107.

29. There may well have been some instances of inconsistent state treatment of depreciation in the past. However, we do not seek controversy unless it is necessary to protect vital federal interests. Either such instances did not come to our attention or they may not have appeared threatening to federal interests.[14] In the past the communications marketplace was typified by monopoly conditions and life and salvage factors underlying the state rates were generally very similar, if not identical, to those

[14] *Pacific Telephone and Telegraph Company v. California*, 401 P.2d 353 (1965), was cited in the *Preemption Order* to support nonpreemption. However, the California Supreme Court did not analyze Section 220(b) or its legislative history and its determination is therefore unpersuasive.

used by the Commission. In that environment it was not essential that the Commission assert all the authority granted it. See *Computer and Communications Industry Association v. FCC*, No. 80-1471 (D.C. Cir. November 12, 1982). As discussed, *infra.*, in the more competitive conditions prevailing today, the utilization of proper methods and rates is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of that competition to the ratepayers of this country. Therefore, where it is necessary to protect important federal policies against frustration by inconsistent state actions, we will exercise the full breadth of our depreciation powers. *See* para. 14 above.

30. Nor is there any merit to the argument that federal preemption of depreciation practices constitutes intrastate ratemaking which might run afoul of 47 U.S.C. 152(b). Section 220(b) only prohibits the states from setting depreciation rates for telephone property inconsistent from those prescribed by the FCC. It does not require that any particular tariff for intrastate service be accepted by the state commissions. The setting of depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process. It does not restrict the state commission's broad discretion in setting charges for individual services. In any event, Section 2(b) of the Act, 47 U.S.C. 152(b), has a well defined purpose which would not be implicated here: "to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." *NCUC I, supra* at 794 n.6. Here the setting of depreciation rates is not an essentially local incident or practice and it has substantial effects upon the administration and development of the interstate telephone network.[15]

[15] Nor is federal preemption of depreciation practices inconsistent with 47 U.S.C. 221(b). Section 221(b) was intended to reserve state jurisdiction over exchange rates where exchange

D. *Preemption Under Federal Supremacy*

31. Even if one were to assume that Section 220(b) did not automatically preempt the states whenever this Commission has acted, federal preemption of inconsistent state depreciation would be justified in this case to avoid frustration of validly adopted federal policies. The Fourth Circuit has stated:

> We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205.

NCUC I, supra at 793. To the same effect, see *Computer and Communications Industry Association v. FCC, supra* at 35.

32. The D.C. Circuit recently addressed the preemption question, observing:

> We fail to see any distinction in this case between preemption principles applicable to state ratemaking authority and those applicable to other state powers. The operative principle [is that] . . . preemption of state tariffs on CPE is justified because state tariffs would interfere with the consumer's right to purchase CPE separately from

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boundaries extend over two states. That provision was not intended to create new reservations to the state beyond that contained in Section 2(b) and the narrow circumstance encompassed by interstate exchanges. See *Computer and Communications Industry Association v. FCC, supra,* and *North Carolina Utilities Commission v. FCC,* 552 F.2d 1036, 1046 (4th Cir. 1976), *cert. denied,* 434 U.S. 874 (1977) (hereinafter cited as *NCUC II*).

> transmission service and would thus frustrate the validly adopted federal policy.

Id. at 38. The court went on to find that conflicting state regulation may be preempted even though there is some indirect effect on state ratemaking discretion, noting:

> the Act itself does not distinguish between authority over rates and authority over other aspects of communications. Sections 2(a) and (b) of the Act allocate federal and state authority with regard to both "charges [and] . . . facilities." Therefore, conflicting federal and state regulations regarding dual use CPE are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *NCUC* cases.

Id. at 38-39.

33. The provision for adequate capital recovery is important to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." 47 U.S.C. 151. State depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment, which constitutes this Commission's policy in those markets found capable of supporting competition, would frustrate the accomplishment of that policy and are preemptable by this Commission.

34. Over the past decade the Commission has embarked in several areas of telecommunications to pursue a policy of encouraging competition wherever the market conditions will support such a policy and produce benefits to the public interest. In *MTS-WATS Market Structure Inquiry*, 81 FCC2d 177 (1980), the Commission opened the domestic MTS-WATS market to competitive entry, reserving the question of

impair their ability to raise the investment capital they will need to fully compete in the continually evolving competitive telecommunications marketplace.[16] Such a result could undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices.

38. NARUC contends that preemption with respect to station connections is unnecessary and will not produce competitive benefits because expensing is not the same as unbundling. While NARUC is correct is a strict sense, it avoids the critical issue, which is the proper timing of cost

[16] AT&T and GTE indicate several state commissions have refused to follow, have indicated an intent not to follow, or are being urged not to follow Commission determinations with respect to the expensing of inside wiring and/or the adoption of straight-line equal life group or remaining life depreciation methods. A staff review of state action in conjunction with AT&T intrastate tariff proceedings reveals that all but two states have approved expensing of station connections, that 13 states have rejected and 12 have approved equal life group depreciation, and 9 states have rejected and 22 have approved remaining life group depreciation. Prior to issuing our *Order* in this docket we did not expect that such significant variance would be required by states.

recovery. If the Commission preempts with respect to station connections and all states must expense these costs, current ratepayers will be paying these costs instead of future ratepayers as would be the case with capitalization. Thus, future prices will reflect the appropriate costs for providing those services. Moreover, if these costs are expensed and state commissions must allow rates to cover these costs, it is likely that the cost causative ratepayer will in many cases be charged for the costs being expensed in connection with the provision of inside wiring. Thus, the Commission's objective may be substantially achieved by preempting state commissions from departing from our expensing rules.

39. In 1971 Congress amended the Communications Act to change the procedures for allocating costs between federal and state jurisdictions by adding Section 410(c). The Commission was given the ultimate authority with respect to such allocations, further solidifying its superintendency over common carrier communications. See *NCUC I, supra* at 795. Section 410(c) procedures provide for uniformity in the separations process, thereby insuring that plant, expenses and revenues will be rationally accounted for in the dual jurisdictional environment. The utilization of one depreciation rate is the most effective method for insuring that this uniformity will be maintained and to insure that no jurisdiction bears a greater burden than another in the transition to a fully competitive marketplace. Several parties suggest that under or over recovery will result from one jurisdiction or another because of the shifting usage patterns for telephone plant over time and argue that if such a result were to occur, significant inequities would result to both ratepayers and carriers. A uniform depreciation rate for each class of property applicable to all property whether allocated to the federal or state jurisdiction clearly eliminates these potential problems.

40. For all of these reasons, it is apparent to us that a substantial impact on federal policies could result if state

commissions were allowed to diverge from Commission prescribed depreciation rates and practices. Accordingly, it is essential to preempt inconsistent state depreciation practices to avoid frustration of these vital national policies.

III. *Declaratory Ruling Petition.*

41. GTE of Ohio seeks to have the Commission preempt an order of the Ohio Public Utilities Commission that did not approve remaining life and equal life group rates for intrastate ratemaking purposes. As alleged by GTE of Ohio, the differential in rates amounts to seven million dollars per year. GTE of Ohio states that failure of this Commission to preempt the state will frustrate the achievement of federal policies adopted by this Commission. Its argument is similar to those cited in connection with the reconsideration petition.

42. Essentially the same arguments are made against the GTE of Ohio petition as were urged on reconsideration with regard to the substance of the issue. However, Ohio cites an Ohio statute that precludes the state commission from adopting remaining life depreciation for intrastate purposes.

43. One procedural argument is raised by Ohio with respect to the petition. It contends that the question presented is premature since the order is subject to further reconsideration before the Ohio Commission pursuant to a request filed by GTE of Ohio. We do not agree since the purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists. A case or controversy in the judicial sense is not required, *NCUC I, supra* at 790-1. In this case, it appears necessary to issue such a ruling to clarify for the state commissions and the carriers the effect of our depreciation prescriptions. The fact that reconsiderations proceedings are under way in Ohio does not mitigate against such a course in light of the divergencies from this Commission's depreciation methods and rates that are occurring to the

detriment of federal policies. Thus, we find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void. The existence of a state statute preventing a state commission from adopting a particular method does not affect this determination. When federal preemption is involved, there is no difference between a statute or a regulation of a state commission. Both must fall in the face of overriding federal concerns and policies.

IV. *Conclusion*

44. We have carefully reviewed the record upon reconsideration. The issues raised concerning the *Preemption Order* caused us to reevaluate the statutory language of Section 220(b), the legislative history of the provision, and the relevant judicial and administrative proceedings relating to the subject. Our considered judgment after this review is that the *Preemption Order* must be reconsidered. We find that the most logical and reasonable interpretation of Section 220(b) of the Act is that where the Commission prescribes depreciation rates for classes of property, state commissions are precluded from departing from those rates. Since the depreciation method utilized is a material part in determining the rate to be applied, state commissions are also precluded from departing from the depreciation methods prescribed by the Commission. Thus, the *Expensing Order* is binding upon state commissions and they must expense additions to inside wiring in accordance with the plan established therein. Moreover, they must follow the amortization procedures adopted in that decision for the embedded inside wiring and any additions to the capitalized amount as a result of the phase-in of the expensing of inside wiring.

45. Even if Section 220(b) does not preempt state commissions, we would act under our authority to preempt state actions that interfere with the accomplishment of federal policies and objectives. *Computer and Communications Industry Association v. FCC, supra,* and

NCUC II. We note that petitioner and the parties supporting the petition cite several states that have indicated they do not intend to follow the commission's depreciation prescriptions or expensing of inside wiring, or have refused to follow either. In light of the concerns expressed about an efficiently functioning market, we must find that inconsistent depreciation rates prescribed by state commissions will interfere with the efficient operation of the communications marketplace and thereby frustrate the achievement of the Commission's policies. Accordingly, we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates.

46. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), and 220(b), That the Petition for Reconsideration filed by the American Telephone and Telegraph Company IS GRANTED.

47. IT IS FURTHER ORDERED, That the Petition for Declaratory Ruling filed by General Telephone Company of Ohio IS GRANTED to be extent reflected herein.

48. IT IS FURTHER ORDERED, That the Secretary shall cause this order to the published in the Federal Register.

49. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this order to be served on each state commission.

FEDERAL COMMUNICATIONS COMMISSION[17]

WILLIAM J. TRICARICO,
Secretary

[17] *See attached separate statement of Commissioner Joseph R. Fogarty.*

Appendix A. Summary of Comments

1. AT&T argues that the Commission on reconsideration should find that state commissions are precluded from departing from the depreciation methods and rates established by this Commission in order to allow the carriers to achieve timely capital recovery. It views the *Preemption Order* as a retreat from the Commission's competitive policies.

2. AT&T asserts that realistic depreciation rates are essential to attain accurate cost-based pricing decisions to prevent artificial barriers to competition, to foster technological innovation which will enhance network efficiency and the availability of competitive alternatives, to facilitate the timely implementation of the detariffing of customer premises equipment[18] and to insure the financial viability of the carriers. It contends that competitive conditions result in faster obsolescence and shorter asset lives, requiring that depreciation methods and rates be inseparable from ratemaking to insure capital recovery.

3. AT&T proposes two legal theories for preempting state commission action. First, it asserts that the Commission may preempt under Sections 1 and 2 of the Act, citing *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978), *NCUC II*, *NCUC I*, and *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976). It states that because of the central role depreciation, including the depreciation aspects of station connections, plays in the achievement of the Commission's policies, preemption is necessary to avoid interference with or frustration of these policies.

4. AT&T's second theory is that Section 220(b) preempts states on its face, asserting that in its earlier

[18] It contends that different depreciation rates between jurisdictions will result in disagreements about net book value in deregulating CPE and that the application of the Separations Manual will create uncertainty as to which plant a particular book value relates.

pleadings it did not rely on Section 220(g) as suggested by the commission's decision. It argues that Section 220 gives the Commission discretion with respect to accounting rules, but does not give it such discretion with regard to depreciation prescriptions. AT&T states that the Commission's rule allowing carriers to subdivide an account to comply with a state commission order does not mean that a state can require capitalization when this Commission requires expensing. Finally, it submits that the Commission misread the legislative history of the Communications Act by failing to consider statements in the committee reports and remarks of members at committee hearings that indicate Congress believed the Interstate Commerce Act provisions from which Section 220(b) was taken did in fact preempt the states. See also *Depreciation Charges of Telephone Companies*, 118 I.C.C. 295 (1926).

5. GTE asserts that the Commission's policies in the areas of competition and faster capital recovery will be frustrated if the state commissions are allowed to depart from the depreciation rates and methods prescribed by the Commission. It contends that Section 220(b) preempts the states and distinguishes Section 220(a) as being discretionary on the Commission and argues that the Commission focused only on the provisions of Section 220(a) in its earlier decision. It submits that there is no doubt that a state can require a carrier to keep additional records and memoranda. However, GTE argues that the Commission's decision is overly broad. It is clear, GTE contends, that the Commission can preempt inconsistent state action when it conflicts with national telecommunications policies, and it should do so in this case. GTE also argues that the legislative history and the rules of statutory construction indicate that Congress intended to preempt the states in the area of depreciation, submitting that property cannot be successfully depreciated at two different rates prescribed by different regulatory bodies because under or over recovery from one or the other jurisdiction will occur from the use of shifting usage factors.

6. The oppositions generally argue that the states have the jurisdiction to determine the extent to which intrastate rates reflect depreciation and expensing adjustments promulgated by the Commission. Sections 2(b) and 221(b) are cited as reserving jurisdiction over local and intrastate telephone rates to the states as intended by Congress when it distinguished between "interstate" and "intrastate" in Sections 1 and 2. Ohio argues that the preemption argument was rejected in the only case of which it is aware, *Pacific Telephone and Telegraph Company v. California*, 401 P.2d 353 (1965).

7. Ohio asserts that the courts have distinguished between ratemaking and interconnection policies, *NCUC II* and *NCUC I*, and submits that it is the ratemaking jurisdiction reserved to the states that is in question in this proceeding. To permit the Commission to prescribe depreciation rates applicable to all property whether used for interstate or intrastate services would, in Ohio's view, be equivalent to giving the FCC a hand in setting state rates.

8. Ohio is concerned that under some methods, such as remaining life, costs will not be charged to consumers who receive the benefits of the property being depreciated. Finally, it contends that Sections 220(i) and (j) are consistent with concurrent jurisdiction.

9. Ohio argues that GTE is attempting to have the Commission read Section 2(b) out of the Act, and asserts that it is inappropriate to ignore language in a statute, to extend a statute beyond its clear import, or to embrace subjects not specifically enumerated. Section 2(b)(1) is stated by Ohio to have been intended to reverse the Supreme Court decision in *Houston East and West Texas Ry. v. U.S.*, 234 U.S. 342 (1914), wherein the ICC was given the power to suspend intrastate rates enabling carriers to raise intrastate rates to federal levels for similar distances. NARUC and Ohio argue that Section 2(b) was intended to ensure that state jurisdiction was not limited by the 1934 legislation.

10. Several parties assert that there is considerable Commission precedent recognizing the states' independent ratemaking authority, including departures from Commission prescribed accounting, for intrastate rates. They note that the Commission has encouraged state commissions to devote more resources to depreciation matters, *Amendment of Part 31,* 83 FCC2d 267 (1980) *recon.*, 87 FCC2d 916 (1981), has recognized in this proceeding the state jurisdiction over expensing of station connections for state ratemaking purposes, has recognized divergent treatment of interest during construction and has not contested California's use of remaining life for approximately thirty years. Ohio argues that there is nothing to suggest that there needs to be national uniformity in depreciation procedures and that local diversity is desirable, noting that even a GTE of Ohio witness in an Ohio rate case has indicated that local diversity in setting depreciation rates is preferable.

11. Ohio contends that *McDonnell Douglas Corp. v. General Telephone Company of California,* 594 F.2d 720 (9th Cir. 1979), recognized the validity of intrastate regulatory jurisdiction under the Act by finding that Congress in enacting Section 2(b) had intended to give states considerable power with respect to wire communications that are wholly intrastate in nature.

12. California argues that the Commission's refusal to preempt state power to prescribe depreciation rates for intrastate ratemaking purposes will not undermine the Commission's procompetitive policies or signal a retreat since many states have adopted policies that foster competition. AT&T's assertion that preemption must be exercised to promote procompetitive policies is rejected by NARUC as unsupported. It states that expensing of station connection costs can have no competitive effect because expensing is not the same as unbundling. Moreover, it contends that the Commission did not adopt remaining life and equal life group depreciation procedures to promote competition but, rather, to more

properly time capital recovery and insure that any deficiency in past depreciation was adjusted. Finally, NARUC states that the speculative statements about the nfumbers of states that are not following the Commission's policies are inadequate to justify preempting state commission jurisdiction on the theory that federal policies are being frustrated.

13. NARUC argues that the attempted distinction of Section 220(a) from Section 220(b) on the basis that Section 220(b) is mandatory while Section 220(a) is discretionary does not address the question of the preemptive effect of either section. It contends that neither reason nor case law provides support for asserting that preemption of state regulation of intrastate communications is automatic with respect to subject areas which the FCC must regulate on the interstate level. It further notes that the language of Section 220(b) does not differ significantly from that in Section 220(g) with respect to the effect of prescribed depreciation rates, accounts or records other than as prescribed by the Commission. NARUC states that the relationship between accounting and ratemaking is self evident and argues that state control over intrastate rates would have little vitality if state commissions were deprived of the power to disallow expenses and depreciation claimed by carriers. NARUC asserts that the fact that a proposed Section 220(j) that would have expressly reserved depreciation prescription powers to the states was not adopted does not mean that states must be bound by Commission depreciation prescriptions, stating that the final provision adopted was a compromise.

14. Consumers' Counsel supports the Commission's *Preemption Order* and generally cites from that *Order* in support of its position. Idaho also agrees with the conclusion of the Order and states that it believes that administrative costs of separate record keeping to meet state requirements will be small Arkansas filed to indicate that its opinions had not rejected the new depreciation

methods outright but had left the decision to individual cases for resolution.

15. AT&T's reply submits that the setting of depreciation rates does not constitute the exercise of jurisdiction with respect to charges for intrastate services. It argues that Section 2(b) does not deprive this Commission of jurisdiction over jointly used property where its regulation affects the conduct or development of interstate communications. AT&T states that if a state utilized the depreciation rate prescribed by the Commission, it may make adjustments to the test period data to reflect concepts of used and useful property or other pro forma adjustments to reflect conditions during the period during which the tariff will be in effect.

16. AT&T distinguishes *Houston East and West Texas Ry. Co. v. U.S., supra,* by asserting that that case involved actual preemption of service rates. It notes that while Congress may have sought to reverse that decision in the communications field, the issue here is only the jurisdiction to prescribe depreciation rates. Thus, it contends that the case actually suggests that Section 2(b) should be narrowly interpreted. Moreover, while use of federally prescribed depreciation rates may significantly affect intrastate rates, the states remain free to price individual service rates. See *e.g., NCUC I.*

17. USITA submits that federal preemption of jurisdiction over depreciation rate prescriptions for carriers for which the Commission has prescribed depreciation rates would not interfere with state commission ability to set intrastate service rates in accordance with any ratemaking method desired. It contends that the setting of depreciation rates is not a ratemaking function pursuant to Sections 201-205, but is the exercise of a specific power granted to the Commission by Congress. USITA argues that divergent depreciation rates create confusion and raise problems of capital recovery.

18. GTE contends that state action whether in the nature of ratemaking or otherwise which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" will be preempted. *Fidelity Federal Savings and Loan Association v. de la Cuesta,* 50 LW 4916, 4919 (1982). GTE concludes that the states do not have the power through the guise of ratemaking to negate FCC action designed to give effect to federal statutory objectives. GTE does not challenge state rights pursuant to state statutes to regulate rates for intrastate services. It asserts that no preclusion of state ratemaking jurisdiction would result from FCC preemption under Section 220(b), although failure to preempt will endanger important national policies.

19. GTE submits that Section 220(b) charges the Commission with the responsibility of prescribing depreciation rates for carriers subject to the Act and recognizes only two exceptions. First, the Commission should act as soon as possible. Second, Section 220(h) recognizes that certain classes of carriers may be exempted. The Commission, according to GTE, has not exercised its authority pursuant to this provision in this proceeding. Finally, GTE argues that reliance on *NCUC I* and *NCUC II* as supporting a finding that the Commission cannot preempt state commission depreciation prescriptions for carriers subject to the Act is inconsistent with the holdings and analysis of those cases. AT&T and GTE submit that Section 221(b) is inapplicable because that provision was intended only to give states the jurisdiction to regulate local exchange service extending over a state boundary.

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Reconsideration of Docket No. CC 79-105.

Having dissented from the Commission's original decision declining to preempt State accounting and de-

preciation rules inconsistent with those prescribed by the FCC,[19] I am pleased that the Commission has reconsidered this issue and acted to preempt such inconsistent State regulation.

As this *Order* establishes in detail, a true reading of the statutory language and legislative history of Section 220(b) of the Communications Act clearly demonstrates that Congress intended FCC depreciation rules and policies to control the field.

Even if preemption were not explicitly mandated by Section 220(b), the effective implementation of our pro-competitive federal telecommunications policies dictate that inconsistent State depreciation regulation be preempted by this Commission. We cannot "defer to the States" on capital recovery issues. Telephone companies must be able to recover their cost of capital in a timely and effective manner if they are to price their services efficiently and to improve and expand their facilities to meet the challenges of competition and technologic innovation.

This preemption imperative is not merely theoretical. Too many States (e.g., Alabama, Louisiana, Nebraska, Ohio, New Jersey, Michigan, Arkansas) have already refused to recognize the critical necessity of the FCC's cost recovery principles. The resulting depreciation rate differentials are alarming: GTE of Ohio has indicated that it will be denied $7 million in capital recovery this year if the State of Ohio's disparate depreciation treatment is allowed to prevail.

The FCC cannot ignore the detrimental impacts of inconsistent State treatment of depreciation if our procompetitive policies are to have any integrity and viability. This Commission now recognizes that pre-

[19] Amendment of Part 31, Joint Dissenting Statement of Commissioners Joseph R. Fogarty and Anne P. Jones, 89 FCC2d 1109-1111 (1981).

emption is both mandated as a matter of law and essential as a matter of policy, and our action today has my full endorsement and support.

②

No. 84-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF MARYLAND,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Do the federal district courts have jurisdiction under Section 401(b) of the Communications Act (which authorizes suits to enforce "any order" of the FCC except an order for the payment of money) to enjoin a state commission's undenied violation of an FCC order that was served on the state commission and required compliance with depreciation policies and rates set by the FCC in a proceeding in which the state commission participated?

2. Are state commissions such as the petitioner excluded from the definition of "person" in Section 401(b) of the Communications Act, making them immune from any suits by the FCC or private parties to enjoin their refusal to obey an FCC order?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

The Chesapeake and Potomac Telephone Company of Maryland (hereinafter "C&P")[1] hereby responds to and opposes petitioner Public Service Commission of Maryland's (hereinafter "Maryland PSC") petition for review of the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on November 20, 1984.

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[1] Respondent C&P is a wholly-owned subsidiary of Bell Atlantic Corporation. The affiliates of C&P with publicly traded securities are as follows:

The Bell Telephone Company of Pennsylvania
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
The Diamond State Telephone Company
New Jersey Bell Telephone Company

Opinions Below

The opinion of the Fourth Circuit in this case, and the preceding decision of the United States District Court for the District of Maryland, are attached as Appendices A and B, respectively, to the Maryland PSC's brief and are reported at 748 F.2d 879 (1984) and 560 F. Supp. 844 (1983).

Statement of the Case

This case involves the Maryland PSC's defiance of a series of Federal Communications Commission ("FCC") orders (i) prescribing depreciation rates and policies for C&P's telephone plant jointly used to provide interstate and intrastate service, and (ii) directing that all state utility commissions, including the Maryland PSC, not depart from those federally prescribed depreciation rates in determining charges for intrastate telephone service. The Maryland PSC refused to comply with these orders even though it participated in the FCC proceedings in which the depreciation rates for C&P were set, and was served with a copy of the FCC ruling directing that state commissions apply the FCC-prescribed depreciation rates in setting intrastate telephone charges.

C&P's telephone plant is jointly used to provide both interstate and intrastate service. For example, a telephone line at a customer's home or office is used to make both local intrastate calls and long-distance interstate calls.

Section 220(b) of the Communications Act of 1934, 47 U.S.C. § 220(b), authorizes the FCC to prescribe depreciation rates for this jointly used telephone plant. In 1982, the FCC issued three separate orders setting depreciation rates for various classes of C&P property which is jointly used to provide both interstate and intrastate service.[2] The Maryland PSC participated in all three proceedings and voiced its opposition

[2] *American Tel. & Tel. Co.*, 88 F.C.C.2d 1223 (1982) (depreciation rates for C&P's existing telephone plant); *The Chesapeake and Potomac Telephone Co.*, 90 F.C.C.2d 964 (1982) (depreciation rates for new outside plant); *American Tel. & Tel. Co.*, 92 F.C.C.2d 693 (1982) (depreciation rates for new central office equipment).

to the rates ultimately prescribed for C&P by the FCC. In all three orders (hereinafter the "Prescription Orders"), the question of whether the FCC's depreciation prescriptions would be binding for intrastate ratemaking purposes was raised by the participating state commissions.[3] The final resolution of this question was addressed in the last of the three orders, in which the FCC announced that "[w]e have today ruled that our depreciation orders are binding *at both the federal and state levels,*"[4] and cited an order adopted the same day in a separate proceeding, *In re Amendment of Part 31, Uniform System of Accounts, etc.*, 92 F.C.C.2d 864 (1983) (hereinafter the "Preemption Order").

The Preemption Order was issued after extensive deliberations in which numerous state regulatory commissions actively participated. The FCC there declared that "where the [FCC] prescribes depreciation rates for classes of property, *state commissions are precluded from departing from those rates*" because "inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void." 92 F.C.C.2d at 879 (emphasis added). The FCC directed that the Preemption Order "be served on each state commission," *id.* at 880, and a copy was in fact served on the Maryland PSC.

Rather than appeal the Prescription Orders or the Preemption Order,[5] as it could have pursuant to Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), the Maryland PSC chose to defy those FCC rulings. In a general ratemaking proceeding relating to C&P, the Maryland PSC on February 18, 1983 issued an order in which it expressly refused to comply with the FCC's Preemption Order—on the stated ground that

[3] *American Tel. & Tel. Co., supra,* 88 F.C.C.2d at 1232, 1237; *The Chesapeake and Potomac Tel. Co., supra,* 90 F.C.C.2d at 968, 971; *American Tel. & Tel. Co., supra,* 92 F.C.C.2d at 697, 700.

[4] *American Tel. & Tel. Co., supra,* 92 F.C.C.2d at 700 (emphasis added).

[5] The Preemption Order was appealed by another state commission to the Fourth Circuit, which upheld its validity in *Virginia State Corporation Commission v. FCC*, 737 F.2d 388 (1984), *petition for cert. filed sub nom. California, et al. v. FCC*, 53 U.S.L.W. 3449 (U.S. Dec. 10, 1984) (No. 84-889).

the FCC simply was wrong—and sought to apply depreciation rates for intrastate service different from those prescribed by the FCC in the Prescription Orders.[6]

C&P then initiated this action in the United States District Court for the District of Maryland to enjoin the Maryland PSC and each of its individual members from prohibiting C&P from collecting charges that reflected the FCC-mandated depreciation rates. Jurisdiction was based, *inter alia,* on Section 401(b) of the Communications Act, 47 U.S.C. § 401(b). Section 401(b) authorizes the United States, the FCC, and any injured private party to bring suit in the federal district courts for the enforcement of "any order of the Commission other than for the payment of money" against "any person" disobeying such an order.[7]

[6] The Maryland PSC determined that "the depreciation practices established by the FCC in no way limit this Commission's authority to independently determine the appropriate level of depreciation expense to be reflected in intrastate rates for telephone service." Order No. 66114, *In the Matter of the Application of the Chesapeake and Potomac Telephone Company of Maryland to Increase and Restructure Its Schedule of Rates and Charges,* Case No. 7661, at 18 (Feb. 18, 1983).

[7] Section 401(b) provides, in full, as follows:

> "If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

FCC orders are conclusively valid for purposes of enforcement suits brought in the federal district courts under Section 401(b); the validity of an FCC order can only be reviewed by a court of appeals pursuant to Section 402 of the Communications Act. *FCC* v. *ITT World Communications, Inc.,* ____ U.S. ____, 104 S. Ct. 1936, 1939 (1984).

The district court, after determining that jurisdiction existed under Section 401(b), entered a preliminary injunction requiring the Maryland PSC to permit C&P to use the depreciation rates and methodologies prescribed by the FCC. 560 F. Supp. at 847. The district court found that C&P was sustaining irreparable injury because the intrastate charges approved by the Maryland PSC produced $16.1 million less in revenues than would have been produced had the charges been set using the FCC-prescribed depreciation rates, and that state law precluded C&P from subsequently recovering the intervening shortfall. *Id.* at 848.

The Maryland PSC subsequently appealed to the Fourth Circuit, which on November 20, 1984 upheld the district court's issuance of the injunction. The Fourth Circuit ruled that the Preemption Order is an "order" enforceable under Section 401(b) and rejected the Maryland PSC's contention that it is not a "person" within the meaning of Section 401(b). 748 F.2d at 881.

Reasons for Denying the Writ

The Maryland PSC's petition for review of the Fourth Circuit's decision should be denied. The reasons for denying the writ can be summarized as follows:

1. The Fourth Circuit correctly decided in this case that the Preemption Order is encompassed by the phrase "any order" in Section 401(b) and is enforceable thereunder. The Fifth Circuit expressly reached the same conclusion in *South Central Bell Telephone Co.* v. *Louisiana Public Service Commission,* 744 F.2d 1107 (5th Cir. 1984), *appeal filed,* No. 84-870 (U.S. Nov. 30, 1984). Moreover, the Preemption Order has been enforced against state commissions by the Eighth Circuit and by a number of federal district courts.[8] The single contrary decision is that of the First Circuit in *New England*

[8] *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission,* 738 F.2d 901 (8th Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3290 (U.S. Sept. 26, 1984) (No. 84-483); *Wisconsin Bell, Inc.* v. *Public Service Comm'n of Wisconsin,* Civ. No. 84-C-4 (E.D. Wis. Nov. 13, 1984); *Mountain States*

(footnote continues)

Telephone and Telegraph Co. v. *Public Utilities Commission of Maine,* 742 F.2d 1 (1st Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3460 (U.S. Dec. 5, 1984) (No. 84-900), on the ground that the Preemption Order is a rulemaking order not enforceable under Section 401(b).[9] While the lack of accord among the circuits is one of several factors considered by the Court in passing upon petitions for review,[10] the circumstances of this case do not warrant grant of the petition:

—The Fourth Circuit's decision is supported strongly by the broad language of the statute referring to "any order" and at least two decisions of *this* Court. *Ambassador* v. *United States,* 325 U.S. 317 (1945); *Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407 (1945). In addition, the FCC—the agency charged with administering the Communications Act—has stated its view that the Preemption Order is enforceable under Section 401(b).

—The First Circuit's construction of the phrase "any order" in Section 401(b) as not including "rulemaking decisions" like the Preemption Order not only mischaracterizes the nature of the Preemption Order, but also (i) is a solitary holding that has not been followed in any other circuit and (ii) is without any precedential support. There is no cause for the Court to review a case simply because of a single errant court of appeals decision, particularly where, as here, there is already controlling precedent of the Court.

(footnote continued)

Tel. & Tel. Co. v. *Department of Public Service Regulation,* 588 F. Supp. 5, 9 (D. Mont. 1983); *Southwestern Bell Tel. Co.* v. *State Corp. Comm'n,* No. 83-4090 (D. Kan. Apr. 8, 1983); *Pacific N.W. Bell Tel. Co.* v. *Washington Utility and Transportation Comm'n,* 565 F. Supp. 17, 21 (W.D. Wash. 1983). In *New England Tel. & Tel. Co.* v. *Public Service Bd. of Vermont,* 576 F. Supp. 490, 496 (D. Vt. 1983), the district court originally declined to enforce the Preemption Order, but the district court's decision was subsequently vacated as moot.

[9] The decision of the Fifth Circuit—inexplicably not mentioned in the Maryland PSC's petition—considered at length and rejected the prior, contrary determination of the First Circuit in the *New England Telephone* case.

[10] This factor is "neither controlling nor fully measur[es] the Court's discretion." Supreme Court Rule 17.1.

—The construction of the term "order" advanced by the Maryland PSC in any event defies common sense. There is no question that the Maryland PSC acted in violation of the Preemption Order, which was served upon it and was intended by the FCC to be immediately binding. There is no reason why a superfluous adjudicatory proceeding should be required, to declare unlawful the Maryland PSC's undenied violation of the Prescription Orders and the Preemption Order, before action can be taken by anyone to halt an ongoing violation of law causing irreparable injury to regulated parties. Congress could not have intended in Section 401(b) to stymie in this awkward manner the ability of the FCC and private parties to enjoin promptly clear violations of self-executing FCC orders.

2. The Maryland PSC's petition for review on the grounds that it is not a "person" subject to suit under Section 401(b) should likewise be denied. The question involved is one of routine statutory interpretation that was correctly decided by the Fourth Circuit, and there is not even any conflict among the circuits on this issue. If the Maryland PSC's argument that a state commission is not a "person" under Section 401(b) were accepted, state utility commissions would effectively be free to violate all orders of the FCC with impunity, a result hardly consistent with the rule of law and Congress' intention in the Communications Act to regulate the exercise of state power.

I. The Fourth Circuit Properly Determined that the Preemption Order Is an "Order" Enforceable Under Section 401(b) of the Communications Act, and There Is No Need for Review of That Determination by This Court

The Maryland PSC contends in its petition for review that the Preemption Order was not issued in an "adjudicatory" proceeding, and that the FCC's directive therein that the state commissions comply with FCC-prescribed depreciation rates is therefore not a type of "order" enforceable under Section 401(b). This contention is confronted at the outset by the character and context of the Preemption Order. As described above (at pp. 2-3), the Maryland PSC participated in the three proceedings in which the Prescription Orders were issued, the last of which cited the Preemption Order and stated that the

depreciation rates prescribed by the FCC are to be binding on the state commissions. Additionally, the Preemption Order (i) was served on the Maryland PSC at the FCC's direction, (ii) requires no further interpretation by the FCC, and (iii) indisputably was intended by the FCC to be immediately binding on the Maryland PSC and all other state commissions. Under these circumstances, the Maryland PSC's characterization of the Preemption Order as no more than a general "rulemaking decision," as opposed to a specific and self-executing agency order, is simply inaccurate.

Even if the Preemption Order were labelled a "rulemaking" order, it nonetheless is enforceable under Section 401(b) of the Communications Act. That statutory provision grants the federal district courts jurisdiction over any action brought by the FCC, the United States, or "any injured party" to enforce "*any order* of the Commission other than for the payment of money" against "any person" that "fails or neglects to obey" the order. (Emphasis added.) The statutory language of Section 401(b)—phrased in these sweeping terms and referring broadly to "any order"—does not distinguish between "adjudicatory" orders and self-executing "rulemaking" orders served by the FCC on specific parties. The common-sense meaning of the statutory language thus refutes the Maryland PSC's contention that the language of Section 401(b) should somehow be construed as only permitting enforcement of "orders" of the former type but not of the latter type.[11]

Any doubt as to the correctness of the decision below, and to the possible need for the Court's review of that decision, should be dispelled by the decisions of *this* Court confirming

[11] As this Court recently explained:

"[I]n all cases involving statutory construction, 'our starting point must be the language employed by Congress,' *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979), and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.' *Richards* v. *United States*, 369 U.S. 1, 9 (1962). Thus, '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982).

that the term "order" as used in Section 401(b) and an adjacent jurisdictional provision of the Communications Act includes self-executing FCC orders reached through rulemaking or similar proceedings.

First, in *Ambassador* v. *United States*, 325 U.S. 317 (1945), the Court held that the FCC could bring suit under "§ 401" against hotels for their violation of a tariff regulation that had been filed by a telephone company in compliance with an FCC rulemaking order but that had not been specifically reviewed by the FCC. In citing Section 401 in support of its conclusion that "the prosecution of an action to restrain a violation is authorized," 325 U.S. at 325, the Court could only have been referring to Section 401(b). Section 401(a)—the only other portion of Section 401 granting the federal district courts any jurisdiction—only authorizes a district court to enjoin violations of the Communications Act itself,[12] and the violation of a tariff regulation is obviously not a violation of any provision of the Act. *See South Central Bell, supra*, 744 F.2d at 1117. If a tariff filed by a telephone company is enforceable under Section 401(b), a formal FCC ruling such as the Preemption Order should certainly be enforceable as well.

Second, in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942), the Court held that self-executing FCC regulations were "orders" within the meaning of Section 402(a) of the Communications Act, which provides for appellate court review of "any *order* of the Commission under this chapter . . ." 47 U.S.C. § 402(a) (emphasis added). The same conclusion must apply to the term "order" in Section 401(b), the jurisdictional provision immediately preceding Section 402.[13] There is a "natural presumption that identical words

[12] Section 401(a) provides as follows:

"The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter." 47 U.S.C. § 401(a).

[13] FCC rulemaking orders prescribing accounting methods and depreciation rates and practices have long been thought reviewable under Section 402(a). *See, e.g., American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232 (1936).

used in different parts of the same act are intended to have the same meaning," *Atlantic Cleaners & Dryers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932), and any departure from this presumption is not warranted where, as here, there is no express legislative history indicating that a different meaning was intended. Indeed, as the Fifth Circuit noted, "the First Circuit was not able to cite, and our own research fails to uncover, a single precedent in support of its [contrary] interpretation." *South Central Bell, supra*, 744 F.2d at 1116 (footnote omitted).

There are also persuasive policy grounds for concluding that the Preemption Order—which was served upon and said by the FCC to bind the state commissions—falls within the "any order" phrase of Section 401(b). If that were not the case, neither the FCC nor any private party—no matter how adversely affected by a state commission's undisputed defiance of an unequivocal FCC rulemaking order—could enforce such an order until the FCC had commenced and concluded an adjudicatory proceeding to command the obedience of the particular state commission. This would require redundant FCC proceedings that would serve no constructive purpose. By the Preemption Order, the FCC required compliance of all state commissions with FCC-prescribed depreciation rates and policies; and by the Prescription Order proceedings, in which the Maryland PSC participated, the FCC defined the exact rates and policies which C&P was to follow for interstate and intrastate ratemaking purposes. The Maryland PSC has not explained and cannot explain why the FCC should have to repeat itself in an adjudicatory order before injunctive relief can be obtained against the admitted violation of a substantive rule of law which would cause irreparable damage to C&P and to the federal interest.

Indeed, the FCC has spoken in favor of private enforcement of the Preemption Order and self-executing FCC rules under Section 401(b). As the agency charged with administering the Communications Act, the FCC's views are entitled to considerable weight.[14] In an *amicus curiae* brief submitted to

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[14] *E.g., Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, _____U.S._____, 104 S. Ct. 2778, 2782 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's

(footnote continues)

the First Circuit in *New England Telephone, supra*, in support of a petition for rehearing, the FCC said as follows:

> "The Commission has broad discretion to use either rulemaking or case-by-case adjudication (or some combination of both) to carry out its responsibility to enforce the Act. It is well within that discretion for it to adopt self-executing rules to implement the Act and then to rely in part on private enforcement actions such as the ones involved in the several depreciation cases. The very justification for a private enforcement statute such as Section 401(b) is that the agency may not have the resources to police every violation of its orders and that aggrieved private parties with something at stake can help it with its job." [15]

The FCC also noted in its amicus brief that the possible need in some cases—but not in the case of the Preemption Order—for the agency's special expertise in applying FCC rulemaking orders does not require that such FCC orders *never* be enforceable under Section 401(b).[16]

(footnote continued)

construction of a statutory scheme it is entrusted to administer. . . .") (footnote omitted); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-27 (1971).

[15] Memorandum of Federal Communications Commission as Amicus Curiae in Support of Petition for Rehearing, at 14 (July 27, 1984), *New England Telephone, supra* (footnotes omitted).

[16] As the FCC explained:

> "If questions of interpretation or basic fact or broad communications policy arise, the enforcing court can and should either refer such questions to the FCC under the doctrine of primary jurisdiction or solicit the FCC's views as an intervenor or as amicus curiae. In this way, the FCC's principal role as enforcer of the Communications Act is satisfied, and the district court fulfills the specific role Congress made for it in Section 401(b)." *Id.* at 15 (footnote omitted).

In *South Central Bell, supra*, the Fifth Circuit similarly observed that "through the use of agency intervention and amicus curiae briefs, as well as through the application of the doctrine of primary jurisdiction, the courts and the FCC should be able to prevent both significant inconsistent application of FCC rules and serious judicial encroachment upon FCC responsibilities." 744 F.2d at 1118.

Finally, the Court's review of the decision of the Fourth Circuit in this case is not merited simply because the First Circuit has—in a solitary errant decision that itself is the subject of a certiorari petition—held that the Preemption Order is not an enforceable "order" under Section 401(b).[17] As noted above, the Fourth, Fifth, and Eighth Circuits have now upheld the enforceability of the Preemption Order under Section 401(b). The Seventh Circuit has, in connection with a different FCC order, also ruled that FCC rulemaking orders are enforceable under Section 401(b). *Illinois Bell Telephone Co.* v. *Illinois Commerce Commission,* 740 F.2d 566, 570 (7th Cir. 1984) (FCC rulemaking order freezing "separation" method used to allocate expenses between interstate and intrastate telephone company business is enforceable under Section 401(b)). In sum, there simply does not exist sufficient doubt as to the correctness of the decision in this case, or sufficient disagreement among the circuits, to merit the Court's review.

II. There Is No Cause for the Court To Review the Fourth Circuit's Determination that the Petitioner Is a "Person" Subject to Suit Under Section 401(b)

The Maryland PSC also argues that the Court should grant its petition for review because the Fourth Circuit erred in holding that a state utility commission constitutes a "person" within the meaning of Section 401(b) and subject to enforcement of FCC orders thereunder. The scope of the term "person" in Section 401(b) involves a routine question of statutory interpretation of no great significance, and there is not even any split among the circuits on the interpretation of that term. Accordingly, this claim does not warrant the Court's review.

In addition to these factors, the Court's review is not warranted since the Fourth Circuit was on strong ground in ruling as it did.

[17] Even if the Court does not review and reverse the First Circuit's decision, the FCC is free under the First Circuit's decision to enter an adjudicatory order against the Public Utilities Commission of Maine compelling compliance with the Preemption Order. The Court's review is thus not required to ensure a consistent application of the Preemption Order.

First, the Maryland PSC's claim that the statutory definition of "person" excludes state commissions is erroneous. The definition of "person" in the Communications Act[18] describes what the term "includes." Where a statutory definition is phrased in this manner, "the fact that the statute does not specifically mention a particular entity . . . does not imply that the entity falls outside of the definition." *Highway & City Freight Drivers, Dockmen and Helpers, Local Union No. 600* v. *Gordon Transports, Inc.,* 576 F.2d 1285, 1289 (8th Cir.), *cert. denied,* 439 U.S. 1002 (1978).[19] This rule of statutory construction has been specifically applied to federal statutes involving the definition of the term "person."[20] The lack of any mention of "state commissions" in the Communications Act's definition of "person" is therefore of no significance.

Second, the interpretation of the term "person" urged by the Maryland PSC is inconsistent with the legislative purpose of the Communications Act. Each of the principal enforcement provisions of the Communications Act—and not just Section 401(b)—refers to "persons," and none refer explicitly to "state commissions."[21] Accordingly, if the Maryland PSC's reading of the term "person" in Section 401(b) were accepted, state

[18] The Communications Act defines the term "person" in the following manner:

> "For the purpose of this Act, unless the context otherwise requires—
>
> * * *
>
> (i) "'Person' includes an individual, partnership, association, joint-stock company, trust, or corporation." 47 U.S.C. § 153.

[19] *See, e.g., Puerto Rico Maritime Shipping Authority* v. *ICC,* 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) (use of the word "including" in statute indicates that the specified list which follows is illustrative, not exclusive); *Argosy Ltd.* v. *Hennigan,* 404 F.2d 14, 20 (5th Cir. 1968); 2A N.J. Singer, *Statutes and Statutory Construction* § 47.07 at 132 (Sands 4th ed. 1984).

[20] *E.g., United States* v. *City of New York,* 481 F. Supp. 4, 6 (S.D.N.Y.) (definition of "person" in Federal Water Pollution Control Act held to include municipalities even though not listed specifically in statutory definition), *aff'd,* 614 F.2d 1292 (2d Cir. 1979), *cert. denied,* 446 U.S. 936 (1980); *In re Maidman,* 2 Bankr. 569, 575-76 (Bankr. S.D.N.Y. 1980) (definition of "person" in Bankruptcy Act held to include noncorporate trustee), *aff'd,* 668 F.2d 682 (2d Cir. 1982).

[21] For example, Section 312(b) of the Communications Act provides that the FCC may order "persons" to cease and desist from violating or

(footnote continues)

commissions would be completely immune from any action brought by the FCC, the United States, or private parties to enforce FCC orders or the Communications Act itself.

Such a result would effectively place state utility commissions above the law and would frustrate and conflict with Congress' intent in the Communications Act to establish an efficient, nationwide communications policy under which the FCC in appropriate circumstances is empowered to preempt state authority.[22] Congress could not conceivably have enacted legislation designed to curb state power while providing no means of enforcement against actions of state commissions that conflict with superseding state law.

Finally, the individual members of the Maryland PSC were named defendants in this action and were ordered by the district court to comply with the terms of the Preemption Order. As the Fourth Circuit noted, "even if PSC is not a 'person' within the meaning of Section 401(b), PSC's officials are expressly covered by that section." [23] 748 F.2d at 881. The Maryland PSC's proffered interpretation of the term "person" as excluding state commissions is thus irrelevant and without merit.

(footnote continued)

failing to observe an FCC rule or regulation. 47 U.S.C. § 312(b). Section 401(a) of the Communications Act similarly provides that the Attorney General of the United States may, upon request of the FCC, bring an action in federal court to require "persons" to comply with the requirements of the Communications Act. 47 U.S.C. § 401(a).

[22] *See, e.g., Computer and Communications Industry Association* v. *FCC,* 693 F.2d 198, 214 (D.C. Cir. 1982) ("Courts have consistently held that when state regulation of interstate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulation must necessarily yield to the federal regulatory scheme") (footnotes omitted), *cert. denied,* 461 U.S. 938 (1983); *North Carolina Utilities Comm'n* v. *FCC,* 552 F.2d 1036, 1043-44 (4th Cir.), *cert. denied,* 434 U.S. 874 (1977); *North Carolina Utilities Comm'n* v. *FCC,* 537 F.2d 787 (4th Cir.), *cert. denied,* 429 U.S. 1027 (1976).

[23] The practice of naming individual state officers as defendants in injunction suits challenging actions of state utility commissions is a common one, and stems from this Court's decisions construing the Eleventh Amendment. *See, e.g., Quern* v. *Jordan,* 440 U.S. 332, 337 (1979); *Edelman* v. *Jordan,* 415 U.S. 651, 665 (1974); *Ex parte Young,* 209 U.S. 123, 159 (1908). *See generally* C. Wright, *The Law of Federal Courts* 292 (4th ed. 1983).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 27, 1985

(3)

No. 84-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

KIRK J. EMGE,
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Public Service Commission of Maryland,
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J. WILLIAM SARVER,
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PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 15, 1985
CERTIORARI GRANTED JUNE 24, 1985

The Daily Record Co., Baltimore, MD 21202

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No. 84-1362

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CALENDARED

Docket No. 83-1403

Friday December 9, 1983

Origin: DMD at Baltimore; DC Docket No.: C/A N-83-855; DC Judge: Edward S. Northrop; Filed in DC:

03/21/83; DC Judgment: 04/06/83; NOA Filed: 04/14/83; Amended NOA: 05/03/83; Docketed 05/03/83; Fee Paid ☒; Case Type: CV.PRI; Rule 17: Complete; Caption ☒ Complete.

Title of Case:

The Chesapeake and Potomac Telephone
Company of Maryland, Appellee,

v.

Public Service Commission of Maryland,
Frank O. Heintz, Chairman,
William A. Badger, Commissioner,
Lilo K. Schifter, Commissioner,
Wayne B. Hamilton, Commissioner,
Haskell N. Arnold, Commissioner, Appellants.

and

Ronald Hawkins, Executive Director and Maryland
Office of People's Counsel, Defendants.

Federal Communications Commission, Amicus Curiae.

Appearances:

Appellant/Petitioner:

05/12/83, Kirk J. Emge, 231 East Baltimore Street, Baltimore, MD 21202, (301) 659-6012.

Appellee/Respondent:

05/13/83, J. William Sarver, One East Pratt Street, Baltimore, MD 21202, (301) 393-7725 and 05/13/83, Mark J. Mathis, Michael J. Morrissey, D. Michael Stroud, 1710 H Street, NW, Washington, DC 20006, (202) 392-5121.

RECORD OF APPEAL

Docket No. 83-1403

Filed 6/29/83

Pleadings: 1 ((Vol. I) — Transcript: 1 (Vol. II)

Withdrawn: 2 Volumes (ska) 7/25/83, Kay Craig,
Returned 7/27/83.

Brief and Appendix:

8/5/83—6 copies of Joint Appendix filed CS-js.

8/5/83—12 copies of Appellant's Brief filed CS-js.

9/8/83—12 copies of Appellee's Brief filed CS-js.

9/22/83—12 copies of Appellant's Reply Brief filed HD-js.

Summary of Events:

Argument: 12-9-83 wc; Panel: DR FDM (JHM); Opinion: Nov. 20, 1984; Judgment: Nov. 20, 1984; Disposition: aff P jrg; Mandate Issued: 12-11-84 lgs; Record Returned: 12-11-84 lgs; Certiorari: 2/15/85 84-1362; Granted 6/24/85 lgs.

Continuation of Appearances:

Appellee: 5/31/83, Lewis T. Booker, Virginia W. Powell, Hunton & Williams, P.O. Box 1535, Richmond, VA 23212, (804) 788-8200.

Appellant: 07-18-83, Sandra L. Hall, Staff Attorney, Public Service Commission, 231 E. Baltimore Street, Baltimore, MD 21202, (301) 659-6000.

Honorable James H. Michael, Jr., U.S District Judge, P.O. Box 671, Charlottesville, VA 22902.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1403

DOCKET ENTRIES

05/03/83—Case docketed. Awaiting ROA. tcb.

05/12/83—DISCLOSURE STMNT, As, N, filed. tcb.

05/13/83—DISCLOSURE STMNT, E, Y, filed. tcb.

06/30/83—BRIEFING ORDER filed, A due 08/09/83. Tentative calendar October/November 1983. tcb.

07/14/83—DESIGNATION—As, parts to be included in joint appendix, and statement of issues on appeal, filed. tcb.

07/18/83—DESIGNATION—E, additional parts to be included in joint appendix, filed. tcb.

12/2/83—MOTION (L-8) of Federal Communications Commission for leave to file statement as amicus curiae, filed. BMM:gac.

12/2/83—STATEMENT of Federal Communications Commission as amicus curiae in lieu of brf, filed. BMM:gac.

12/5/83—Transmitted Motion (L-8) and statement of FCC to DSR/FDM/ J.H. Michael-U.S.D.J. on 12/5/83. BMM:gac.

12/14/83—ORDER granting motion of Federal Communications Commission for leave to file statement as amicus curiae, filed. SAW-zyj Copy to Emge; Sarver; Mathis-Morrissey-Stroud; Booker-Powell; Hall.

DOCKET ENTRIES

(United States District Court)

1983

Mar. 21—(1) — COMPLAINT and Attachments.

Mar. 22 — Magistrate Notice and L.R. 10-A to Counsel for Plaintiff.

Mar. 23—(2) — Motion of Plaintiff for Preliminary Injunction, Memorandum and Affidavits (2), and ORDER (MURRAY, J) (dated Mar. 21, 1983) DIRECTING Defendants reply to Motion on or before Mar. 28, 1983, and to

show cause at hearing April 6, 1983, why Motion should not be granted as therein set forth. (cc Attorney for Plaintiff 3/23/83).

Mar. 22—(3) — Local Rule 10-A Letter of Plaintiff.

Mar. 22—(4) — Motion of Plaintiff for Admission of Michael D. Stroud, *PRO HOC VICE*. C/S

Mar. 22—(5) — Summons issued. (cc, Magistrate Notice and Notice and Acknowledgement to Counsel for Plaintiff for service.) (All except Hamilton served 3/22/83; see entry No. 7) (Hamilton served 3/22/83, see entry No. 8).

Mar. 24—(6) — Stipulation and Order (Black, J) (dated 3/23/83) extending the time within which Defendant is to answer Show Cause Order to on or before 3/31/83. (c/m 3/24/83 jg)

Mar. 25—(7) — Affidavit of Service. (As to all Defendants except Hamilton.)

Mar. 31—(8) — Affidavit of Service.(As to Defendant, Wayne B. Hamilton)

Mar. 31—(9) — Opposition of Defendant, Public Service Commission of Maryland to Motion of Plaintiff for Preliminary Injunction and Answer to Show Cause Order; and Memorandum and Attachment. (c/s)

Mar. 31—(10) — Motion of Maryland Office of People's Counsel for Leave to Intervene; Memorandum; (c/s)

Mar. 31—(11) — Opposition of Proposed Intervenor, Maryland Office of People's Counsel to Motion of Plaintiff for Preliminary Injunction; and Attachments A and B. (c/s)

Apr. 6 — Hearing on Motion of Plaintiff for Preliminary Injunction held before Northrop, S.J. (Reporter: Mackaro)

Apr. 6 — Oral Motion of Plaintiff for admission of Michael G. Stroud, Esq. pro hac vice — "GRANTED.".

Apr. 6—(12) — Order (Northrop, S.J.) "GRANTING" Motion of the Maryland Office of People's Counsel for Leave to Intervene; making them a party Defendant in the case; and directing that the Proposed Answer of said Defendant shall stand as it's Answer. (c/m 4/6/83 cd)

Apr. 6—(13) — ANSWER of Defendant *MARYLAND OFFICE OF PEOPLE'S COUNSEL.*

Apr. 6—(14) — Order (Northrop, S.J.) "GRANTING" Motion of Plaintiff for Preliminary Injunction, with provisions as therein set forth. (c/m 4/6/83 cd)

Apr. 7—(15) — Memorandum (Northrop, S.J.). (c/m by chambers)

Apr. 8—(16) — ANSWER of Defendants *P.S.C., HEINTZ, BADGER, SCHIFTER, HAMILTON,* and *ARNOLD.*

Apr. 14—(17) — ANSWER of Defendant *HAWKINS.*

Apr. 14—(18) — Notice of Appeal (Received 4/11/83) of Defendants HEINTZ, BADGER, SCHIFTER, HAMILTON and ARNOLD from Order dated April 6, 1983. (Filing fee paid) (Transcript purchase order form mailed to counsel 4/18/83)

Apr. 19—(19) — Certificate of Defendants of intent not to order transcript and Statement of Issues.

Apr. 20—(20) — Order (Northrop, S.J.) Directing that case be "CLOSED" as therein set forth. MicroFilmed (c/m by chambers) (closed cah)

Apr. 21—(21) — Transcript purchase order form (copy) from Defendents, noting a transcript is not needed for the appeal, statement of issues attached. (See P1, #24)

Apr. 28—(22) — Designation of Plaintiff to Defendant of transcript to be included in Record.

May 3—(23) — Amended Notice of Appeal of Defendants. (c/m 5/3/83)

May 9—(24) — Letter (copy) from Defendants to Court Reporter, ordering transcript of proceedings as therein set forth.

June 27—(25) — Transcript of proceedings before the Court (Northrop, S.J.) taken on April 6, 1983. (Filed Separately)

United States District Court
District of Maryland

Civil Action No. N 83-855

The Chesapeake and Potomac Telephone
Company of Maryland
One East Pratt Street
Baltimore, Maryland 21202

Plaintiff,

v.

Public Service Commission of Maryland
Ronald Hawkins, Executive Director
Frank O. Heintz, Chairman,
William A. Badger, Commissioner,
Lilo K. Schifter, Commissioner,
Wayne B. Hamilton, Commissioner,
Haskell N. Arnold, Commissioner,
231 East Baltimore Street
Baltimore, Maryland 21202

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

(Filed March 21, 1983)

Plaintiff, The Chesapeake and Potomac Telephone Company of Maryland, brings this action for a declaratory judgment that the refusal of the Defendants Maryland Public Service Commission and each of its members to allow Plaintiff to collect intrastate charges for telephone services to recover depreciation expense based on depreciation rates prescribed by the Federal Communications Commission is unlawful because (1) it expressly violates an FCC order that Defendants must use FCC-prescribed depreciation rates to determine the depreciation expense to be recovered from intrastate charges for telephone services; (2) it expressly violates Section 220(b) of the Federal Communications Act, 47 U.S.C. § 220(b), which directs the FCC to prescribe Plaintiff's depreciation rates; and (3) it conflicts with the Federal Communications Commission's preemption of inconsistent state prescriptions of depreciation rates which was intended to preclude state actions from frustrating national telecommunications policies adopted by the FCC under the Communications Act. Plaintiff asks that Defendants be permanently enjoined from preventing Plaintiff from collecting intrastate charges for telephone services to recover the depreciation expense based on Federal Communications Commission prescribed depreciation rates.

A preliminary injunction is also requested because (1) Plaintiff is losing $44,000 a day in revenues and is thus suffering substantial and irreparable harm; (2) customers would be completely protected from any harm by permitting Plaintiff to collect rates subject to refund with interest; (3) a serious question has been raised by this Complaint, and in another case directly on point, a preliminary injunction was issued; and (4) issuance of a preliminary injunction is in the public interest because it

will stop Defendants from obstructing national telecommunications policy.

Jurisdiction and Venue

1. This action arises under the Federal Communications Act, 47 U.S.C. §§ 151 *et seq.* ("Communications Act"), and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. This Court has jurisdiction over this action under Section 401(b) of the Communications Act and under Sections 1331 and 1337 of Title 28 of the United States Code.

2. Venue exists in this district under 28 U.S.C. § 1391. The acts complained of occurred in this district, and the claims arose in this district. The Defendant Maryland Public Service Commission is an agency established by Maryland law, and it has its offices and performs its functions in this district at 231 East Baltimore Street, Baltimore, Maryland. The individual Defendants, who are the members of the Maryland Public Service Commission, all have offices at 231 East Baltimore Street, Baltimore, Maryland. The individual Defendants all reside within this district.

The Parties

3. Plaintiff, The Chesapeake and Potomac Telephone Company of Maryland ("C&P"), is a Maryland corporation with offices at Constellation Place, One East Pratt Street, Baltimore, Maryland. Plaintiff C&P provides interstate and foreign telecommunications services under the Communications Act. Plaintiff also provides intrastate telephone services in the State of Maryland.

4. Defendant Maryland Public Service Commission ("PSC") is a regulatory agency created and existing under law of the State of Maryland.

5. Defendants Frank O. Heintz, William A. Badger, Lilo K. Schifter, Wayne B. Hamilton and Haskell N. Arnold

are now, and were at the time of the acts complained of herein, the members of the Defendant PSC. Defendant Frank O. Heintz is now, and was at the time of the acts complained of herein, the Chairman of the Defendant PSC.

Substantive Allegations

The Structure of the Communications Act

6. The Communications Act provides a comprehensive scheme for the federal regulation of telecommunications by the Federal Communications Commission ("FCC") for the purpose of making available rapid, efficient, nationwide telecommunications service at reasonable charges. 47 U.S.C. §§ 151, 152. Among the powers given to the FCC to achieve this purpose is the power to prescribe depreciation rates for Plaintiff C&P. 47 U.S.C. § 220(b). Because Plaintiff C&P's telephone equipment is used to provide both interstate and intrastate telephone services, however, the FCC must afford Defendant PSC an opportunity to present its views before prescribing Plaintiff C&P's depreciation rates. 47 U.S.C. § 220(i). Moreover, the FCC may, in its discretion, refrain from prescribing Plaintiff C&P's depreciation rates in favor of Defendant PSC's prescription. 47 U.S.C. § 220(h).

The FCC's Prescription of Plaintiff's Depreciation Rates

7. The FCC, in a series of proceedings, prescribed depreciation rates for Plaintiff C&P. In each case, the FCC provided Defendant PSC notice and an opportunity to participate consistent with the requirements of the Communications Act and in each case Defendant PSC did participate.

(a) In *American Telephone & Telegraph Co.*, 88 F.C.C.2d 1223, 1252 (1982), the FCC prescribed depreciation rates for Plaintiff C&P's existing telephone plant, notwithstanding objections voiced by Defendant PSC and other state regulatory commissions in that proceeding.

(b) In *The Chesapeake and Potomac Telephone Co.*, 90 F.C.C.2d 964, 976 (1982), the FCC prescribed depreciation rates for Plaintiff C&P's new outside plant, notwithstanding objections voiced by Defendant PSC and other state regulatory commissions in that proceeding.

(c) In *American Telephone & Telegraph Co.*, FCC 82-576 (Dec. 30, 1982), the FCC prescribed depreciation rates to be used for Plaintiff C&P's new central office equipment, notwithstanding objections voiced by Defendant PSC and other state regulatory commissions in that proceeding. While Defendant PSC raised objections to each one of these FCC depreciation rate prescriptions, it did not appeal any of the FCC's final orders.

The Communications Act and Federal Telecommunications Policy Have Preempted State Commissions' Prescription of Conflicting Depreciation Rates

8. The FCC has ruled that Defendant PSC and other state commissions are required by the Communications Act, 47 U.S.C. § 220(b), to use the FCC-prescribed depreciation rates to determine the depreciation expense which must be recovered from intrastate charges for telephone services. Moreover, the FCC has preempted conflicting state prescriptions of depreciation rates because such state action frustrates federal policies and objectives "to develop . . . a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices." *Uniform System of Accounts*, CC Docket No. 79-105, FCC 82-581, p. 15 (Jan. 6, 1983), *appeal pending sub. nom., Virginia Corporation Commission v. FCC*, 4th Cir. U.S. Ct. App., Case No. 83-1136 (*See* Attachment A; hereinafter referred to as the "Preemption Order"). The *Preemption Order* was regularly made and duly served on Defendant PSC, but it did not seek review of this order. While the *Preemption Order* has been appealed by another state commission, it has not been stayed pending appeal. *Virginia Corporation Commission v. FCC, supra.*

Defendants Have Refused To Use FCC-Prescribed Depreciation Rates To Set Plaintiff's Intrastate Charges

9. Based upon the *Preemption Order,* Plaintiff C&P requested Defendant PSC to set its intrastate charges to recover the depreciation expense based on the depreciation rates prescribed by the FCC. While the rate increase required to recover this depreciation expense totalled $16.1 million in annual revenue, or $44,000 a day, the impact on individual customers would have been very slight because it would amount to an increase of no more than 2.2%. On February 18, 1983, Defendant PSC in Order No. 66114 (*See* Attachment B) nevertheless refused to use the FCC prescribed depreciation rates to set Plaintiff C&P's intrastate charges for telephone services.

Plaintiff Is Being Substantially And Irreparably Harmed

10. Because Plaintiff C&P is experiencing a *daily* revenue shortfall of some $44,000, it is being substantially and irreparably harmed by Defendant PSC's refusal to abide by the FCC's *Preemption Order.* Under applicable regulatory law, Plaintiff C&P cannot retroactively recover these lost revenues. This irreparable harm can only be prevented during the pendency of this action by preliminarily enjoining Defendants from prohibiting Plaintiff C&P from collecting intrastate charges for telephone services based on FCC-prescribed depreciation rates. By contrast to the harm C&P is suffering, its customers can be completely protected from any harm of paying more than just and reasonable rates by Plaintiff C&P collecting these intrastate charges subject to refund with interest. Plaintiff C&P will clearly succeed on the merits because Defendant PSC cannot dispute that it violated the FCC's *Preemption Order.* Issuance of a preliminary injunction enjoining Defendants from preventing Plaintiff C&P from collecting intrastate charges for telephone services based on FCC-prescribed depreciation rates will

be in the public interest because it will stop Defendants from obstructing national telecommunications policy.

11. In an identical situation the United States District Court for the Western District of Washington recently entered a preliminary injunction prohibiting the Washington Utilities and Transportation Commission from refusing to set intrastate telephone charges of Pacific Northwest Bell Telephone Company to recover the depreciation expense based on FCC-prescribed depreciation rates. *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transportation Commission,* No. C83-214C, Memorandum Opinion (W.D. Wash., Mar. 10, 1983) (*See* Attachment C).

Causes of Action

Count I: Violation of FCC's Preemption Order

12. Plaintiff C&P realleges and incorporates by reference each and every allegation in paragraphs 1 through 11 hereof.

13. The Defendants' refusal to set Plaintiff C&P's intrastate charges to recover the depreciation expense from using the FCC-prescribed depreciation rates violates the *Preemption Order.*

14. As a direct result of Defendants' violation of the *Preemption Order,* Plaintiff C&P is suffering irreparable harm because it is being deprived of approximately $44,000 in revenues daily to which it is entitled and which it would be receiving if its intrastate charges for telephone services were set based on the depreciation rates prescribed by the FCC.

Count II: Violation of Section 220(b) of the Communications Act

15. Plaintiff C&P realleges and incorporates by reference each and every allegation in paragraphs 1 through 11 hereof.

16. The Defendants' refusal to set Plaintiff C&P's intrastate charges to recover the depreciation expense from using the FCC-prescribed depreciation rates violates Section 220(b) of the Communications Act.

17. As a direct result of Defendants' violation of the Communications Act, Plaintiff C&P is suffering irreparable harm because it is being deprived of approximately $44,000 in revenues daily to which it is entitled and which it would be receiving if its intrastate charges for telephone services were set based on the depreciation rates prescribed by the FCC.

Count III: Conflict With Federal Policy

18. Plaintiff realleges and incorporates by reference each and every allegation in paragraphs 1 through 11 hereof.

19. The Defendants' refusal to set Plaintiff C&P's intrastate charges to recover the depreciation expense based on the FCC-prescribed depreciation rates conflicts with the FCC's preemption of conflicting state action and therefore interferes with interstate commerce in violation of the Commerce Clause and the Federal Supremacy Clause of the United States Constitution. U.S. Const. Art. I, § 8 cl. 3; U.S. Const. Art. VI.

20. As a direct result of Defendants' violation of the Commerce Clause and the Federal Supremacy Clause of the United States Constitution, Plaintiff C&P is suffering irreparable harm because it is being deprived of approximately $44,000 in revenues daily to which it is entitled and which it would be receiving if its intrastate charges for telephone services were set based on the depreciation rates prescribed by the FCC.

Prayer for Relief

WHEREFORE, Plaintiff C&P respectfully requests that this Honorable Court:

(1) Pending a hearing upon the merits of this case, issue a preliminary injunction enjoining the Defendants from

the operation, enforcement or execution of that portion of PSC Order No. 66114 which prevents Plaintiff C&P from collecting intrastate charges for its telephone services to recover the depreciation expense based on the depreciation rates prescribed by the Federal Communications Commission;

(2) Issue a declaratory judgment that the Defendants' refusal to set Plaintiff C&P's intrastate charges for telephone services to recover the depreciation expense based on the depreciation rates prescribed by the Federal Communications Commission is unlawful because it violates the *Preemption Order*, the Communications Act, and the United States Constitution;

(3) Issue a mandatory and permanent injunction enjoining the Defendants from the operation, enforcement or execution of that portion of PSC Order No. 66114 which prevents Plaintiff C&P from collecting intrastate charges for its telephone services to recover the depreciation expense based on the depreciation rates prescribed by the Federal Communications Commission; and

(4) Grant such other and further relief which, to this Honorable Court, may be just or proper.

Respectfully submitted,

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Attorneys for The Chesapeake and Potomac Telephone Company of Maryland

Robert A. Levetown
Mark J. Mathis
Michael J. Morrissey
Of Counsel

VERIFICATION OF COMPLAINT

I, J. Henry Butta, verify that I am Vice President of The Chesapeake and Potomac Telephone Company of Maryland, and that the matters and facts set forth in the foregoing Complaint are true and correct to the best of my knowledge and belief.

J. Henry Butta

Subscribed and
sworn to before me
this 21st day of March,
1983

Teresa A. Boarman
Notary Public
Notary Public of Maryland
My Commission expires July 1, 1986.

ATTACHMENT A

Before the
Federal Communications Commission

Washington, D.C. 20554

FCC 82-581
32609

CC Docket No. 79-105 RM-3017

In the Matter of

Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's Rules and Regulations with respect to accounting for station connections, optional payment plan revenues and customer provided equipment and sale of terminal equipment.

Petition for Declaratory Ruling on Question of Federal Preemption Involving Order Of the Public Utilities Commission of Ohio in Conflict with (i) FCC Prescriptions Under Section 220 of the Communications Act and (ii) Established FCC Policies.

MEMORANDUM OPINION AND ORDER

Adopted: *December 22, 1982* Released: *January 6, 1983*

By the Commission: *Commissioner Fogarty issuing a separate statement.*

1. The Commission has before it a Petition for Reconsideration filed on June 7, 1982, by the American Telephone and Telegraph Company, on behalf of itself and the associated Bell System Operating Companies (AT&T). AT&T seeks reconsideration of the Commission's decision in *Amendment of Part 31,* 89 FCC2d 1094 (1982) (hereinafter cited as *Preemption Order*), in which the Commission determined that Sections 220(a) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. 220(a) and 220(b), did not preempt state commissions from applying different accounting and depreciation procedures for purposes of intrastate ratemaking proceedings.[1] The *Preemption Order* was a reconsideration of *Amendment of Part 31,* 85 FCC2d 818 (1981) (hereinafter cited as *Expensing Order*).

2. The Commission also has before it a Petition for Declaratory Ruling filed on June 7, 1982, by General Telephone Company of Ohio (GTE of Ohio). This petition requests that the Commission preempt an order of the Public Utilities Commission of Ohio (Ohio) that denied GTE of Ohio the same depreciation rates for intrastate purposes as had been prescribed by this Commission. GTE of Ohio contends that Section 220(b) established the rate prescribed by the Commission as the only depreciation rate the company could utilize.

[1] On June 8, 1982, GTE Service Corporation, on behalf of itself, United Telephone System, Inc., and Continental Telecom, Inc. (hereinafter referred to as GTE), filed a Petition for Clarification of the Commission's *Preemption Order.* This petition was dismissed as untimely. *Amendment of Part 31,* Mimeo No. 4766 (released June 24, 1982). However, the Commission stated that it would consider the substance of the petition in connection with AT&T's petition.

3. The Commission established a joint reply period for the two petitions, utilizing the pleading cycle for comments in response to the Petition for Reconsideration, and allowed parties to cross-reference their pleadings where appropriate. In addition to pleadings filed by the petitioners and the GTE parties, comments or reply comments were filed by the Arkansas Public Service Commission (Arkansas), Ohio, the People of the State of California and the Public Utilities Commission of the State of California (California), the Virginia State Corporation Commission (Virginia), the National Association of Regulatory Utility Commissioners (NARUC), the United States Independent Telephone Association (USITA), the Office of Consumers' Counsel, State of Ohio (Consumers' Counsel), the United Telephone System Inc. and the Idaho Public Utilities Commission (Idaho). A summary of the comments is contained in Appendix A. Below we consider the issues raised on reconsideration, after which we shall consider the question presented by GTE of Ohio's Petition for Declaratory Ruling.

I. *Background*

4. In *Docket No. 19129,* 64 FCC2d 1, 54-56 (1977), we concluded that it would be desirable to have the causative rate payer bear the costs associated with station connections. We directed AT&T to file a plan for accomplishing this objective. Following AT&T's submission we initiated this proceeding, albeit with a somewhat different approach for modifying the accounting for station connections than proposed by AT&T.

5. After reviewing the comments, we concluded that the drop, block and protector portion of station connections should not be included in any accounting or regulatory

revisions. We also concluded that our objective of placing the costs of station connections on the cost causative customer could not be achieved by means of an accounting change alone. This is so because costs associated with the provision of inside wiring must be apportioned between the federal and state jurisdictions as long as inside wiring is provided as a tariffed service subject to dual jurisdiction. Complete unbundling could be achieved by requiring inside wiring to be provided on a detariffed basis, as was done with customer premises equipment. Accordingly, we initiated a further inquiry to explore the detariffing concept further, *Amendment of Part 31,* 86 FCC2d 885 (1981).

6. Nevertheless, we concluded that changes in accounting and depreciation procedures that would begin expensing the inside wiring portion of the station connection account would be in the public interest, and would facilitate the deregulation of the provision of inside wiring if the Commission should later decide to take that approach. The principal changes required that future costs of installing inside wiring and similar costs be included as an expense in Account 605, Repair of Station Equipment. Such costs were previously capitalized in Account 232, Station Connections. The expensing of these costs would be phased in over a four year period unless a carrier obtained state commission approval to expense one hundred percent immediately. The *Expensing Order* also required that the present net investment in inside wiring and the investment capitalized during the phase-in period be amortized over a ten year period. These expensing and amortization rules replaced the depreciation procedures that had previously applied to the inside wiring portion of the station connections account.

7. On reconsideration, we concluded that the *Expensing Order* was not intended to preempt state commissions from utilizing other depreciation or accounting procedures for intrastate ratemaking proceedings, unless such preemption occurs as a matter of law. Our discussion was

based in part on an assumption that most or all of the state commissions would follow our lead. We also indicated that Section 220 does not preclude state commissions from departing from accounting and depreciation rules prescribed by this Commission for purposes of regulating intrastate communications services. In reaching this conclusion, we reviewed Section 20(5), the Interstate Commerce Act predecessor of the accounting and depreciation provisions contained in Section 220. We concluded that nothing in the history of Section 20(5) provided any indication of whether that provision had been intended to preempt state commissions from prescribing divergent depreciation rates when the Interstate Commerce Commission (ICC) had prescribed a rate. We stated:

> [i]nasmuch as Section 20 had never been construed to restrict state commissions from requiring carriers to keep additional records for purposes of intrastate ratemaking and court decisions in analagous contexts did not adopt an expansive interpretation of that provision, the reenactment of that language should not be interpreted to restrict state commissions from keeping such additional records in the absence of clear evidence that the 1934 Congress intended to produce that result.

Preemption Order, supra at 1102.

8. We also reviewed the legislative history of the Communications Act and concluded that Congress had been uncertain of the preemptive effect of reenacting the Interstate Commerce Act language and that it apparently did not want to resolve the question at that time. We concluded that Congress had been attempting to obtain as much uniformity as possible without coercing any state commission to use ratemaking methods which it might find unacceptable. We found that we had proceeded in a manner consistent with this purpose for nearly four decades, noting that we had recognized divergent practices by state commissions from time-to-time. The language of Section 2(b)(1) was found to support the interpretation

that state commissions are not precluded from applying different accounting and depreciation procedures from this Commission. The *Preemption Order* concluded by finding that nothing in the Act precluded us from preempting state commission actions that might interfere with or tend to frustrate policies or rules we have adopted to carry out statutory objectives with respect to interstate or foreign communications, but we also found that federal regulation would not be frustrated if carriers maintain additional records for intrastate ratemaking purposes.

II. *Discussion*

9. The question presented in the reconsideration petition is a clearly delineated controversy over whether Section 220(b) preempts state depreciation prescriptions that are inconsistent with the rates prescribed for classes of property by this Commission, or, whether Section 2(b)(1) or Section 221(b) reserve to the states the right to prescribe their own depreciation rates for intrastate regulatory purposes. Alternatively, it is argued that the Commission should preempt inconsistent state depreciation rates pursuant to its authority to preempt state actions which would frustrate or interfere with the accomplishment of federal objectives. *See North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (hereinafter cited as *NCUC I*). The *Preemption Order* was the first time the Commission had squarely addressed the preemptive effect of a prescribed depreciation rate, despite having prescribed rates for more than thirty years. No federal court has addressed the question of the preemptive effect of a Commission prescribed depreciation rate.[2]

[2] The United States Supreme Court has held that state commissions may prescribe depreciation rates where the empowered federal commission has not prescribed rates. *Northwestern Bell Telephone Co. v. Nebraska State Railway Comm.*, 297 U.S. 471 (1936). The Court specifically reserved judgment on the effect of prescribed rates by the federal commission.

10. It is argued that the Commission erred in the earlier decision by concentrating on Sections 220(a) and 220(g) rather than properly analyzing Section 220(b), the provision dealing directly with depreciation. A careful review of AT&T's and GTE's pleadings and a thorough reevaluation of the entire question of the Commission's depreciation jurisdiction leads to the conclusion that the evaluation in the *Preemption Order* did not sufficiently consider the effect of Section 220(b). Accordingly, we shall undertake to evaluate anew the scope of the Commission's jurisdiction under Section 220(b).

11. Before turning to the analysis of the statutory provisions, it is necessary to understand the relationship between capitalizing and expensing a transaction or economic event. When an event is capitalized, its cost is recorded on the company's books to be recovered over some future period through depreciation charges to operating expense. Depreciation as used here is an accounting convention for allocatively spreading the original cost, less net salvage, over the useful life of a capital asset. Thus, for there to be depreciation there must be costs that are to be recovered over more than one accounting period. However, when the decision to expense is made, all costs are to be recovered at one time. Thus, the decision to expense is a determination that there is no category of asset for which depreciation expense will be allowed. It is therefore clear that the decision to commence expensing the inside wiring portion of station connections involves questions of depreciation policy.

12. The law is clear that federal regulation should not be presumed to preempt state regulations without clear evidence of either congressional design to preempt the field or that state regulatory activities would obstruct the accomplishment and execution of the full purposes and objectives of Congress. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963), *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Our review reveals that both criteria are satisfied in this case. In reaching

this conclusion we analyzed the language of Section 220, the legislative history, relevant court cases, and our regulatory objectives.

A. *Statutory Language*

13. The Commission's express jurisdiction with respect to depreciation is set forth in Section 220(b). That section provides:

> The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

14. The plain language of the statute is express and unequivocal. Section 220(b) says the Commission "shall" make depreciation prescriptions, and that carriers "shall not" charge depreciation different than that prescribed by the Commission. That this preempts inconsistent state action is further indicated in Section 220(h) which gives the Commission discretion to "except" carriers from the requirements of Section 220 "where such carriers are subject to state commission regulation."

15. The requirement of Section 220(i) that states be given an opportunity to comment before the Commission prescribes "any requirements as to accounts, records and memoranda" is consistent with an interpretation that states are preempted when the Commission has acted in the depreciation area. By providing that states be given notice, Congress ensured that state needs for accounts, records and memoranda brought to the Commission's attention would be considered. Such a procedure assures that the states' needs and legitimate interests are met.

16. In setting the duties of the Commission and the prohibitions on the carriers subject to the Act, Congress spoke of depreciation in general terms without any attempt to make distinctions between either "intrastate" or "interstate" property. This is significant because when Congress wanted to make such distinctions in the Act it did so. See, *e.g.*, 47 U.S.C. 221(c) and (d), and 410(c). The fact that Congress did not make such a distinction here indicates that it intended no distinction.

17. Taken as a whole, the language of Section 220 appears clearly to preempt the states in connection with depreciation expense determinations and the related accounting. The language strongly implies that the states may not depart from depreciation rules prescribed by the FCC unless the Commission in its discretion allows them to do so. Otherwise, the federal statute would govern state depreciation practices in form only, allowing the states to treat substantive depreciation matters as they might choose. While that might be a plausible construction of Section 220, after full analysis we do not believe that Congress intended such a feeble gesture. There would be little purpose to require the carriers to keep all their books pursuant to an FCC prescription, and then allow the states to require the carriers to follow inconsistent depreciation practices. Instead, the language of the section and the comprehensive treatment given to this matter by the Congress demonstrate that more was intended. Accordingly, we find that the statutory language indicates

that FCC depreciation prescriptions are to be followed in both the federal and state jurisdictions unless the FCC provides otherwise. As demonstrated below, this construction is also consistent with the legislative history.

B. *Legislative History*

18. In the *Preemption Order* we found that the legislative history of Section 220 was inconclusive and at most indicated that Congress was "not sure" about the preemptive effect of the new legislation. 89 FCC2d at 1106. However, the reconsideration petition and comments supporting it show that Congress believed that the language ultimately adopted would preempt the states from prescribing depreciation rates for subject carriers when the Commission had prescribed rates.

19. In our *Preemption Order,* we observed that Section 220 of the Communications Act had been adopted from Section 20 of the Interstate Commerce Act, and our review of the few ICC cases touching upon preemption did not reveal the ICC to have possessed the kind of broad preemptive power now urged by GTE and AT&T. However, after reviewing the pre-1934 cases again, we find that, while not dispositive, they lean more toward GTE and AT&T's views than against them.

20. The closest the ICC came to delineating its position on this matter came in *Depreciation Charges of Telephone Companies,* 118 I.C.C. 295, 332 (1926), where it said:

> It seems to be well established that where a local telephone company undertakes to originate or deliver toll messages, and most of them do so undertake, practically all of its property is open for use in interstate commerce and at any time may be so used. Under such circumstances, no doubt would seem to exist as to the power of Congress to regulate the accounting practices of such companies with respect to their property, including the accounting for depreciation.

In the *Preemption Order* we focused on the fact that the ICC had not actually prescribed depreciation rates and thus there was uncertainty regarding the ICC's actual authority. However, after reviewing that case again we find that the better and more sensible interpretation is that if the ICC had prescribed depreciation rates, the state commissions would have been precluded from prescribing rates that diverged from those it prescribed. We cited *Smith v. Illinois Bell Tel. Co.,* 282 U.S. 133, 159 (1930), in the *Preemption Order* as supporting our conclusion that the ICC decision did not preempt the states. In that decision the Supreme Court held that absent ICC action prescribing depreciation rates, Section 20(5) did not preclude states from prescribing depreciation rates. Since the ICC proceeding did not actually prescribe depreciation rates, but only began a proceeding looking toward the ultimate prescription of depreciation rates, there were no depreciation rates prescribed that could have preempted state-prescribed depreciation rates. Thus *Smith* only stands for the proposition that until the ICC actually prescribed rates, there was no basis for preempting the states. It did not reach the question of whether Section 20(5) would preempt the states if the ICC prescribed depreciation rates[3]

21. At the hearings pertaining to the Communications Act the then chairman of the ICC indicated his belief that the ICC depreciation rulings would govern both federal and state depreciation practices:

> Paragraph (j) . . . should be most carefully considered. It unquestionably directly conflicts with,

[3] Similarly, *Interstate Commerce Commission v. Goodrich Transportation Co.,* 224 U.S. 194 (1912) and *Kansas City Southern Ry. Co. v. I.R.S.,* 52 F.2d 372 (8th Cir. 1931) do not appear to have any pertinence to the issue at hand. As noted in 89 FCC2d at 1099, *Goodrich* did not raise any question with respect to the effect of ICC accounting rules upon activities not subject to ICC rate regulation. The *Kansas* holding simply reconciles two federal statutes, the Internal Revenue Code and the Interstate Commerce Act. It did not purport to establish new law on state preemption.

and destroys the uniformity of systems of accounts and depreciation accounting required by the preceding provisions of the section. That is not true under the present law.[4]

22. Other witnesses who appeared at the hearings repeated the same view. See statements of Mr. Gifford,[5] Mr. Benton,[6] and Dr. Irvin Stewart.[7]

23. The *Preemption Order* relied heavily on the "silence contained in the Congressional Reports," 89 FCC2d 1105, in concluding that the legislative history did not support a finding that Section 220 was intended to preempt state commissions from prescribing their own depreciation rates for intrastate purposes. However, a reexamination of the legislative history in light of the comments on reconsideration indicates that the committee reports accompanying the bills did contain language indicating that the committees believed that the predecessor provision had preempted the states. The House Report, in discussing the Section 220(j) provision (which was not adopted) that would have reserved jurisdiction over depreciation rates to the states for purposes of intrastate ratemaking, stated that the provision was "responsive to the requests of the State commissions that the present law be *changed so as to permit* those bodies to exercise, for State purposes, certain jurisdiction over . . . depreciation accounting."[8]

[4] Ltr. of F. McManamy, Hearings on S. 2910, p. 208.

[5] Hearings on H.R. 8301, pp 191-192 (See 89 FCC2d at 1105, fn.17). The *Preemption Order* had indicated that Mr. Gifford's preemption views were tentative. However, careful review of that testimony reveals that Mr. Gifford's uncertainty may have concerned the date Section 20(5) was enacted, not preemption.

[6] Hearings on S. 2910, 73rd Cong., 2d Sess., p. 181 (1943).

[7] Hearings on H.R. 8301, 73rd Cong., 2d sess., p. 17 (1934).

[8] H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 7 (1934) (emphasis added). The section (j) proposed by the House would have provided: "Nothing in this section shall (1) limit the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction with respect to any carrier the percentage rate of

24. In remarks on the House floor, Representative Rayburn, Chairman, House Committee on Interstate and Foreign Commerce explained Section 220 of the proposed bill as follows:

> [p]aragraphs (a) to (g), relating to accounts records, memoranda, and depreciation, is based upon sections 20(5) to (8) of the Interstate Commerce Act with *changes necessary to permit State commissions to prescribe* the systems of accounts for the intrastate operation of carriers. Paragraphs (h) to (j) are new . . . *paragraph (j) removes any limitation upon the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction, rates of depreciation.* The last three paragraphs named were placed in the bill at the request of the State commissions which feel that their task of regulating intrastate communications will be greatly facilitated by the adoption of these paragraphs.[9]

25. The Senate version of Subsection (j) took a totally different approach than the House version. It called "for investigation and report to Congress instead of immediately turning over these matters to the State." S. Rep. No. 781, 73rd Cong., 2d Sess. 5 (1934).[10] The version of Section

depreciation to be charged to any class of property of such carrier, or the composite depreciation rate, for the purpose of determining charges, accounts, records, or practices; (2) relieve any carrier from keeping any accounts, records, or memoranda which may be required to be kept by any State commission in pursuance of authority granted under State Law." H.R. 8301, 73rd Cong., 2d Sess. Section 220(i) (February 27, 1934).

[9] 78 Cong. Rec. 10314 (1934) (emphasis added).

[10] The Senate version of Section 220(j) provided: "The Commission shall investigate and report to the Congress whether in its opinion legislation is desirable (1) authorizing the Commission to except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates; and (2) permitting the State commissions, in pursuance of authority granted under State Law, to prescribe

220(j) finally enacted was the result of agreement in the conference committee. The conferees agreed to adopt the House provisions as to Sections 220(h) and (i), but decided against the House Section 220(j) proposal to remove any limitation upon the power of states to prescribe rates of depreciation. Instead, Section 220(j) was modified along the lines of the Senate proposal to require the Commission to "investigate and report to Congress as to the need for legislation to define or further harmonize the powers of the Commission and of State commissions with respect to other matters to which this section relates." Conf. Comm. Rep. No. 1918, 73rd Cong., 2d Sess. 17 (1934). The obvious inference to be drawn is that the conferees were not prepared at that time to allow the states to prescribe depreciation rates different than those established at the federal level, but that matter might be considered later if the report required by Section 220(j) indicated it to be appropriate.

26. The hearing testimony and Committee reports therefore indicate that the language being recodified from Section 20(5) of the Interstate Commerce Act preempted the state commissions' jurisdiction over depreciation. The rules of statutory construction provide that where Congress reenacts a provision from an existing statute, it intends that the construction applicable to the existing provision apply as well to the new provision.[11] The legislative history thus supports the actual language of Section 220(b) and indicates that Congress intended to preempt state commission jurisdiction over depreciation rates for subject carriers when it recodified the language from the Interstate Commerce Act. Accordingly, we conclude that the analysis of the legislative history

their own percentage rates of depreciation or systems of accounts records, or memoranda to be kept by carriers." S. 3285, 73rd Cong., 2d Sess. Section 220(j) (March 28, 1934).

[11] Courts have given weight to interpretations of the Interstate Commerce Act in interpreting the Communications Act. See, *e.g., American Telephone and Telegraph Company v. FCC*, 487 F.2d 865 (2d Cir. 1973).

contained in the comments of AT&T and GTE accurately represents the intent of Congress and that the more persuasive reading of the legislative history supports the construction that Section 220(b) preempts inconsistent state action where the Commission has prescribed depreciation rates for a carrier.

C. *Administrative and Court Decisions*

27. The *Preemption Order* cited *Accounting Rules for Telephone Companies*, 203 ICC 13 (1934), as evidence that the FCC could not preempt state depreciation practices. There the ICC recognized that states might have additional accounting needs and indicated that it had permitted state-prescribed sub-accounts within the federally-required books of account. However, the adoption of a blanket subdivision rule does not lead to the conclusion that federally adopted accounting and depreciation rules are not preemptive. Rather, it reflects an awareness that state commissions may have special data requirements to properly administer their regulatory policies which may require additional detail beyond that prescribed by the federal agency. A subdivision rule, however, does not permit what is accounted for as an expense to be capitalized in the guise of subdividing an expense account. While we may allow subdivisions of accounts, we will not allow inconsistent accounting or depreciation methods unless such practices are otherwise consistent with the public interest. Any other policy would obliterate the prescriptive effect of our adoption of a uniform system of accounts.

28. In fact we have approved variations from the prescribed uniform system of accounts. For example, our rules give carriers blanket authority to subdivide certain prescribed accounts "provided such subdivisions do not impair the integrity of the accounts prescribed." 47 C.F.R. 31.01-2(d)(1). C.F. 31.01-2(f), authorizing carriers to subdivide accounts "in the manner ordered by any state commission having jurisdiction. . . ." We also have approved state commission rate making treatment of plant

under construction different from that adopted by us. See 89 FCC2d at 1107.

29. There may well have been some instances of inconsistent state treatment of depreciation in the past. However, we do not seek controversy unless it is necessary to protect vital federal interests. Either such instances did not come to our attention or they may not have appeared threatening to federal interests.[12] In the past the communications marketplace was typified by monopoly conditions and life and salvage factors underlying the state rates were generally very similar, if not identical, to those used by the Commission. In that environment it was not essential that the Commission assert all the authority granted it. See *Computer and Communications Industry Association v. FCC*, No. 80-1471 (D.C. Cir. November 12, 1982). As discussed, *infra.*, in the more competitive conditions prevailing today, the utilization of proper methods and rates is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of that competition to the ratepayers of this country. Therefore, where it is necessary to protect important federal policies against frustration by inconsistent state actions, we will exercise the full breadth of our depreciation powers. *See* para. 14 above.

30. Nor is there any merit to the argument that federal preemption of depreciation practices constitutes intrastate ratemaking which might run afoul of 47 U.S.C. 152(b). Section 220(b) only prohibits the states from setting depreciation rates for telephone property inconsistent from those prescribed by the FCC. It does not require that any particular tariff for intrastate service be accepted by the state commissions. The setting of depreciation rates and

[12] *Pacific Telephone and Telegraph Company v. California*, 401 P.2d 353 (1965), was cited in the *Preemption Order* to support nonpreemption. However, the California Supreme Court did not analyze Section 220(b) or its legislative history and its determination is therefore unpersuasive.

classes of depreciable property only resolves a single issue impacting the ratemaking process. It does not restrict the state commission's broad discretion in setting charges for individual services. In any event, Section 2(b) of the Act, 47 U.S.C. 152(b), has a well defined purpose which would not be implicated here: "to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." *NCUC I, supra* at 794 n.6. Here the setting of depreciation rates is not an essentially local incident or practice and it has substantial effects upon the administration and development of the interstate telephone network.[13]

D. *Preemption Under Federal Supremacy*

31. Even if one were to assume that Section 220(b) did not automatically preempt the states whenever this Commission has acted, federal preemption of inconsistent state depreciation would be justified in this case to avoid frustration of validly adopted federal policies. The Fourth Circuit has stated:

> We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any

[13] Nor is federal preemption of depreciation practices inconsistent with 47 U.S.C. 221(b).

Section 221(b) was intended to reserve state jurisdiction over exchange rates where exchange boundaries extend over two states. That provision was not intended to create new reservations to the states beyond that contained in Section 2(b) and the narrow circumstance encompassed by interstate exchanges. See *Computer and Communications Industry Association v. FCC, supra*, and *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1046 (4th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977) (hereinafter cited as *NCUC II*).

> state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205.

NCUC I, supra at 793. To the same effect, see *Computer and Communications Industry Association v. FCC, supra* at 35.

32. The D.C. Circuit recently addressed the preemption question, observing:

> We fail to see any distinction in this case between preemption principles applicable to state ratemaking authority and those applicable to other state powers. The operative principle [is that] . . . preemption of state tariffs on CPE is justified because state tariffs would interfere with the consumer's right to purchase CPE separately from transmission service and would thus frustrate the validly adopted federal policy.

Id. at 38. The court went on to find that conflicting state regulation may be preempted even though there is some indirect effect on state ratemaking discretion, noting:

> the Act itself does not distinguish between authority over rates and authority over other aspects of communications. Sections 2(a) and (b) of the Act allocate federal and state authority with regard to both "charges [and] . . . facilities." Therefore, conflicting federal and state regulations regarding dual use CPE are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *NCUC* cases.

Id. at 38-39.

33. The provision for adequate capital recovery is important to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." 47 U.S.C.

151. State depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment, which constitutes this Commission's policy in those markets found capable of supporting competition, would frustrate the accomplishment of that policy and are preemptable by this Commission.

34. Over the past decade the Commission has embarked in several areas of telecommunications to pursue a policy of encouraging competition wherever the market conditions will support such a policy and produce benefits to the public interest. In *MTS-WATS Market Structure Inquiry*, 81 FCC2d 177 (1980), the Commission opened the domestic MTS-WATS market to competitive entry, reserving the question of entry to Alaska to a later phase since concluded with the adoption of a similar open entry policy, *MTS-WATS Market Structure Inquiry*, FCC 82-515 (released November 30, 1982). In *Computer Inquiry II*, 77 FCC2d 384 (1980), *recon.*, 84 FCC2d 50 (1980), *recon.*, 88 FCC2d 512, *aff'd sub nom.*, *Computer and Communications Industry Association v. FCC, supra*, the Commission opened the areas of enhanced services and customer premises equipment to competitive provision. These are just two examples of the policies which the Commission has pursued. However, they do point up the fact that if this policy is to be successful, it will be necessary for the marketplace to operate efficiently. Such efficient operation requires proper price signals generating from supply and demand conditions.

35. Capital recovery is an important determinant of the price at which services can be offered and significantly affects the amount of facilities provided to supply the needs of the communications industry. In *Amendment to Part 31*, 83 FCC2d 267 (1980), *recon.*, 87 FCC2d 916 (1981), the Commission adopted remaining life and straight line equal life group depreciation methods that recover capital on a basis that approximates straight line unit depreciation more closely than did the previously used methods. More timely capital recovery was antici-

pated to result in faster technological innovation with its accompanying benefits of more efficient service provision and lower costs resulting from more productive use of facilities.

36. Capital recovery issues are important in the implementation of *Computer Inquiry II* due to the part depreciation plays in the determination of net book value and the resultant gain or loss that may occur on the transfer of assets to the new subsidiary. It will also be significant in any later transfer of assets from the provision of regulated service to unregulated service or vice-versa. Thus, appropriate capital recovery will ease the regulatory burdens associated with supervising the transition to the new structure.

37. Depreciation is a significant portion of the revenue requirement of the regulated telephone companies. As such, it plays an important role in determining the price at which they offer their services. If competition is to be viable, it is necessary for prices to reflect depreciation expenses that are realistic for a competitive market. Absent such depreciation levels, improper signals will be given to the market. Since most plant is used interchangeably to provide interstate and intrastate communications service, supply and demand is determined by the combination of inputs from service demand in both regulatory jurisdictions. Approximately 75 percent of exchange plant is allocated to the intrastate jurisdiction. It is clear that unless telephone plant, including that portion subject to allocation to the intrastate jurisdiction, is depreciated at a reasonable rate, improperly timed capital recovery will occur. Indeed, in an increasingly competitive environment, it is possible that improper capital recovery could delay or prevent modernization which would add to the costs borne by ratepayers and could, ultimately, threaten carriers' ability to fully recover their invested capital. Moreover, the extent of state action attempting to prevent carriers from utilizing our depreciation prescriptions places substantial burdens on carriers

and could well impair their ability to raise the investment capital they will need to fully compete in the continually evolving competitive telecommunications marketplace.[14] Such a result could undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices.

38. NARUC contends that preemption with respect to station connections is unnecessary and will not produce competitive benefits because expensing is not the same as unbundling. While NARUC is correct in a strict sense, it avoids the critical issue, which is the proper timing of cost recovery. If the Commission preempts with respect to station connections and all states must expense these costs, current ratepayers will be paying these costs instead of future ratepayers as would be the case with capitalization. Thus, future prices will reflect the appropriate costs for providing those services. Moreover, if these costs are expensed and state commissions must allow rates to cover these costs, it is likely that the cost causative ratepayer will in many cases be charged for the costs being expensed in connection with the provision of inside wiring. Thus, the Commission's objective may be substantially achieved by preempting state commissions from departing from our expensing rules.

39. In 1971 Congress amended the Communications Act to change the procedures for allocating costs between

[14] AT&T and GTE indicate several state commissions have refused to follow, have indicated an intent not to follow, or are being urged not to follow Commission determinations with respect to the expensing of inside wiring and/or the adoption of straight-line equal life group or remaining life depreciation methods. A staff review of state action in conjunction with AT&T intrastate tariff proceedings reveals that all but two states have approved expensing of station connections, that 13 states have rejected and 12 have approved equal life group depreciation, and that 9 states have rejected and 22 have approved remaining life group depreciation. Prior to issuing our *Order* in this docket we did not expect that such significant variance would be required by states.

federal and state jurisdictions by adding Section 410(c). The Commission was given the ultimate authority with respect to such allocations, further solidifying its superintendency over common carrier communications. See *NCUC I, supra* at 795. Section 410(c) procedures provide for uniformity in the separations process, thereby insuring that plant, expenses and revenues will be rationally accounted for in the dual jurisdictional environment. The utilization of one depreciation rate is the most effective method for insuring that this uniformity will be maintained and to insure that no jurisdiction bears a greater burden than another in the transition to a fully competitive marketplace. Several parties suggest that under or over recovery will result from one jurisdiction or another because of the shifting usage patterns for telephone plant over time and argue that if such a result were to occur, significant inequities would result to both ratepayers and carriers. A uniform depreciation rate for each class of property applicable to all property whether allocated to the federal or state jurisdiction clearly eliminates these potential problems.

40. For all of these reasons, it is apparent to us that a substantial impact on federal policies could result if state commissions were allowed to diverge from Commission prescribed depreciation rates and practices. Accordingly, it is essential to preempt inconsistent state depreciation practices to avoid frustration of these vital national policies.

III. *Declaratory Ruling Petition.*

41. GTE of Ohio seeks to have the Commission preempt an order of the Ohio Public Utilities Commission that did not approve remaining life and equal life group rates for intrastate ratemaking purposes. As alleged by GTE of Ohio, the differential in rates amounts to seven million dollars per year. GTE of Ohio states that failure of this Commission to preempt the state will frustrate the achievement of federal policies adopted by this Commis-

sion. Its argument is similar to those cited in connection with the reconsideration petition.

42. Essentially the same arguments are made against the GTE of Ohio petition as were urged on reconsideration with regard to the substance of the issue. However, Ohio cites an Ohio statute that precludes the state commission from adopting remaining life depreciation for intrastate purposes.

43. One procedural argument is raised by Ohio with respect to the petition. It contends that the question presented is premature since the order is subject to further reconsideration before the Ohio Commission pursuant to a request filed by GTE of Ohio. We do not agree since the purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists. A case or controversy in the judicial sense is not required, *NCUC I, supra* at 790-1. In this case, it appears necessary to issue such a ruling to clarify for the state commissions and the carriers the effect of our depreciation prescriptions. The fact that reconsideration proceedings are under way in Ohio does not mitigate against such a course in light of the divergencies from this Commission's depreciation methods and rates that are occurring to the detriment of federal policies. Thus, we find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void. The existence of a state statute preventing a state commission from adopting a particular method does not affect this determination. When federal preemption is involved, there is no difference between a statute or a regulation of a state commission. Both must fall in the face of overriding federal concerns and policies.

IV. *Conclusion*

44. We have carefully reviewed the record upon reconsideration. The issues raised concerning the *Preemption Order* caused us to reevaluate the statutory language of Section 220(b), the legislative history of the provision, and

the relevant judicial and administrative proceedings relating to the subject. Our considered judgment after this review is that the *Preemption Order* must be reconsidered. We find that the most logical and reasonable interpretation of Section 220(b) of the Act is that where the Commission prescribes depreciation rates for classes of property, state commissions are precluded from departing from those rates. Since the depreciation method utilized is a material part in determining the rate to be applied, state commissions are also precluded from departing from the depreciation methods prescribed by the Commission. Thus, the *Expensing Order* is binding upon state commissions and they must expense additions to inside wiring in accordance with the plan established therein. Moreover, they must follow the amortization procedures adopted in that decision for the embedded inside wiring and any additions to the capitalized amount as a result of the phase-in of the expensing of inside wiring.

45. Even if Section 220(b) does not preempt state commissions, we would act under our authority to preempt state actions that interfere with the accomplishment of federal policies and objectives. *Computer and Communications Industry Association v. FCC, supra,* and *NCUC II.* We note that petitioner and the parties supporting the petition cite several states that have indicated they do not intend to follow the Commission's depreciation prescriptions or expensing of inside wiring, or have refused to follow either. In light of the concerns expressed about an efficiently functioning market, we must find that inconsistent depreciation rates prescribed by state commissions will interfere with the efficient operation of the communications marketplace and thereby frustrate the achievement of the Commission's policies. Accordingly, we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates.

46. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), and 220(b) of the Communications Act of 1934, as

amended, 47 U.S.C. 151, 154(i), and 220(b), That the Petition for Reconsideration filed by the American Telephone and Telegraph Company IS GRANTED.

47. IT IS FURTHER ORDERED, That the Petition for Declaratory Ruling filed by General Telephone Company of Ohio IS GRANTED to the extent reflected herein.

48. IT IS FURTHER ORDERED, That the Secretary shall cause this order to be published in the Federal Register.

49. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this order to be served on each state commission.

FEDERAL COMMUNICATIONS COMMISSION[15]

WILLIAM J. TRICARICO,
Secretary.

Appendix A. Summary of Comments

1. AT&T argues that the Commission on reconsideration should find that state commissions are precluded from departing from the depreciation methods and rates established by this Commission in order to allow the carriers to achieve timely capital recovery. It views the *Preemption Order* as a retreat from the Commission's competitive policies.

2. AT&T asserts that realistic depreciation rates are essential to attain accurate cost-based pricing decisions to prevent artificial barriers to competition, to foster technological innovation which will enhance network efficiency and the availability of competitive alternatives, to facilitate the timely implementation of the detariffing of

[15] See attached separate statement of Commissioner Joseph R. Fogarty.

customer premises equipment[16] and to insure the financial viability of the carriers. It contends that competitive conditions result in faster obsolescence and shorter asset lives, requiring that depreciation methods and rates be inseparable from ratemaking to insure capital recovery.

3. AT&T proposes two legal theories for preempting state commission action. First, it asserts that the Commission may preempt under Sections 1 and 2 of the Act, citing *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978), *NCUC II*, *NCUC I*, and *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976). It states that because of the central role depreciation, including the depreciation aspects of station connections, plays in the achievement of the Commission's policies, preemption is necessary to avoid interference with or frustration of these policies.

4. AT&T's second theory is that Section 220(b) preempts states on its face, asserting that in its earlier pleadings it did not rely on Section 220(g) as suggested by the Commission's decision. It argues that Section 220 gives the Commission discretion with respect to accounting rules, but does not give it such discretion with regard to depreciation prescriptions. AT&T states that the Commission's rule allowing carriers to subdivide an account to comply with a state commission order does not mean that a state can require capitalization when this commission requires expensing. Finally, it submits that the Commission misread the legislative history of the Communications Act by failing to consider statements in the committee reports and remarks of members at committee hearings that indicate Congress believed the Interstate Commerce Act provisions from which Section 220(b) was taken did in fact preempt the states. See also

[16] It contends that different depreciation rates between jurisdictions will result in disagreements about net book value in deregulating CPE and that the application of the Separations Manual will create uncertainty as to which plant a particular book value relates.

Depreciation Charges of Telephone Companies, 118 I.C.C. 295 (1926).

5. GTE asserts that the Commission's policies in the areas of competition and faster capital recovery will be frustrated if the state commissions are allowed to depart from the depreciation rates and methods prescribed by the Commission. It contends that Section 220(b) preempts the states and distinguishes Section 220(a) as being discretionary on the Commission and argues that the Commission focused only on the provisions of Section 220(a) in its earlier decision. It submits that there is no doubt that a state can require a carrier to keep additional records and memoranda. However, GTE argues that the Commission's decision is overly broad. It is clear, GTE contends, that the Commission can preempt inconsistent state action when it conflicts with national telecommunications policies, and it should do so in this case. GTE also argues that the legislative history and the rules of statutory construction indicate that Congress intended to preempt the states in the area of depreciation, submitting that property cannot be successfully depreciated at two different rates prescribed by different regulatory bodies because under or over recovery from one or the other jurisdiction will occur from the use of shifting usage factors.

6. The oppositions generally argue that the states have the jurisdiction to determine the extent to which intrastate rates reflect depreciation and expensing adjustments promulgated by the Commission. Sections 2(b) and 221(b) are cited as reserving jurisdiction over local and intrastate telephone rates to the states as intended by Congress when it distinguished between "interstate" and "intrastate" in Sections 1 and 2. Ohio argues that the preemption argument was rejected in the only case of which it is aware, *Pacific Telephone and Telegraph Company v. California*, 401 P.2d 353 (1965).

7. Ohio asserts that the courts have distinguished between ratemaking and interconnection policies, *NCUC*

II and *NCUC I*, and submits that it is the ratemaking jurisdiction reserved to the states that is in question in this proceeding. To permit the Commission to prescribe depreciation rates applicable to all property whether used for interstate or intrastate services would, in Ohio's view, be equivalent to giving the FCC a hand in setting state rates.

8. Ohio is concerned that under some methods, such as remaining life, costs will not be charged to consumers who receive the benefits of the property being depreciated. Finally, it contends that Sections 220(i) and (j) are consistent with concurrent jurisdiction.

9. Ohio argues that GTE is attempting to have the Commission read Section 2(b) out of the Act, and asserts that it is inappropriate to ignore language in a statute, to extend a statute beyond its clear import, or to embrace subjects not specifically enumerated. Section 2(b)(1) is stated by Ohio to have been intended to reverse the Supreme Court decision in *Houston East and West Texas Ry. v. U.S.*, 234 U.S. 342 (1914), wherein the ICC was given the power to suspend intrastate rates enabling carriers to raise intrastate rates to federal levels for similar distances. NARUC and Ohio argue that Section 2(b) was intended to ensure that state jurisdiction was not limited by the 1934 legislation.

10. Several parties assert that there is considerable Commission precedent recognizing the states' independent ratemaking authority, including departures from Commission prescribed accounting, for intrastate rates. They note that the Commission has encouraged state commissions to devote more resources to depreciation matters, *Amendment of Part 31*, 83 FCC2d 267 (1980) *recon.*, 87 FCC2d 916 (1981), has recognized in this proceeding the state jurisdiction over expensing of station connections for state ratemaking purposes, has recognized divergent treatment of interest during construction and has not contested California's use of remaining life for approxi-

mately thirty years. Ohio argues that there is nothing to suggest that there needs to be national uniformity in depreciation procedures and that local diversity is desirable, noting that even a GTE of Ohio witness in an Ohio rate case has indicated that local diversity in setting depreciation rates is preferable.

11. Ohio contends that *McDonnell Douglas Corp. v. General Telephone Company of California*, 594 F.2d 720 (9th Cir. 1979), recognized the validity of intrastate regulatory jurisdiction under the Act by finding that Congress in enacting Section 2(b) had intended to give states considerable power with respect to wire communications that are wholly intrastate in nature.

12. California argues that the Commission's refusal to preempt state power to prescribe depreciation rates for intrastate ratemaking purposes will not undermine the Commission's procompetitive policies or signal a retreat since many states have adopted policies that foster competition. AT&T's assertion that preemption must be exercised to promote procompetitive policies is rejected by NARUC as unsupported. It states that expensing of station connection costs can have no competitive effect because expensing is not the same as unbundling. Moreover, it contends that the Commission did not adopt remaining life and equal life group depreciation procedures to promote competition but, rather, to more properly time capital recovery and insure that any deficiency in past depreciation was adjusted. Finally, NARUC states that the speculative statements about the numbers of states that are not following the Commission's policies are inadequate to justify preempting state commission jurisdiction on the theory that federal policies are being frustrated.

13. NARUC argues that the attempted distinction of Section 220(a) from Section 220(b) on the basis that Section 220(b) is mandatory while Section 220(a) is discretionary does not address the question of the

preemptive effect of either section. It contends that neither reason nor case law provides support for asserting that preemption of state regulation of intrastate communications is automatic with respect to subject areas which the FCC must regulate on the interstate level. It further notes that the language of Section 220(b) does not differ significantly from that in Section 220(g) with respect to the effect of prescribed depreciation rates, accounts or records other than as prescribed by the Commission. NARUC states that the relationship between accounting and ratemaking is self evident and argues that state control over intrastate rates would have little vitality if state commissions were deprived of the power to disallow expenses and depreciation claimed by carriers. NARUC asserts that the fact that a proposed Section 220(j) that would have expressly reserved depreciation prescription powers to the states was not adopted does not mean that states must be bound by Commission depreciation prescriptions, stating that the final provision adopted was a compromise.

14. Consumers' Counsel supports the Commission's *Preemption Order* and generally cites from that *Order* in support of its position. Idaho also agrees with the conclusion of the Order and states that it believes that administrative costs of separate record keeping to meet state requirements will be small. Arkansas filed to indicate that its opinions had not rejected the new depreciation methods outright but had left the decision to individual cases for resolution.

15. AT&T's reply submits that the setting of depreciation rates does not constitute the exercise of jurisdiction with respect to charges for intrastate services. It argues that Section 2(b) does not deprive this Commission of jurisdiction over jointly used property where its regulation affects the conduct or development of interstate communications. AT&T states that if a state utilized the depreciation rate prescribed by the Commission, it may make adjustments to the test period data to reflect

concepts of used and useful property or other pro forma adjustments to reflect conditions during the period during which the tariff will be in effect.

16. AT&T distinguishes *Houston East and West Texas Ry. Co. v. U.S., supra,* by asserting that that case involved actual preemption of service rates. It notes that while Congress may have sought to reverse that decision in the communications field, the issue here is only the jurisdiction to prescribe depreciation rates. Thus, it contends that the case actually suggests that Section 2(b) should be narrowly interpreted. Moreover, while use of federally prescribed depreciation rates may significantly affect intrastate rates, the states remain free to price individual service rates. See *e.g., NCUC I.*

17. USITA submits that federal preemption of jurisdiction over depreciation rate prescriptions for carriers for which the Commission has prescribed depreciation rates would not interfere with state commission ability to set intrastate service rates in accordance with any ratemaking method desired. It contends that the setting of depreciation rates is not a ratemaking function pursuant to Sections 201-205, but is the exercise of a specific power granted to the Commission by Congress. USITA argues that divergent depreciation rates create confusion and raise problems of capital recovery.

18. GTE contends that state action whether in the nature of ratemaking or otherwise which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" will be preempted. *Fidelity Federal Savings and Loan Association v. de la Cuesta,* 50 LW 4916, 4919 (1982). GTE concludes that the states do not have the power through the guise of ratemaking to negate FCC action designed to give effect to federal statutory objectives. GTE does not challenge state rights pursuant to state statutes to regulate rates for intrastate services. It asserts that no preclusion of state ratemaking jurisdiction would result from FCC pre-

emption under Section 220(b), although failure to preempt will endanger important national policies.

19. GTE submits that Section 220(b) charges the Commission with the responsibility of prescribing depreciation rates for carriers subject to the Act and recognizes only two exceptions. First, the Commission should act as soon as possible. Second, Section 220(h) recognizes that certain classes of carriers may be exempted. The Commission, according to GTE, has not exercised its authority pursuant to this provision in this proceeding. Finally, GTE argues that reliance on *NCUC I* and *NCUC II* as supporting a finding that the Commission cannot preempt state commission depreciation prescriptions for carriers subject to the Act is inconsistent with the holdings and analysis of those cases. AT&T and GTE submit that Section 221(b) is inapplicable because that provision was intended only to give states the jurisdiction to regulate local exchange service extending over a state boundary.

SEPARATE STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY

In Re: Reconsideration of Docket No. CC 79-105.

Having dissented from the Commission's original decision declining to preempt State accounting and depreciation rules inconsistent with those prescribed by the FCC,[17] I am pleased that the Commission has reconsidered this issue and acted to preempt such inconsistent State regulation.

As this *Order* establishes in detail, a true reading of the statutory language and legislative history of Section 220(b) of the Communications Act clearly demonstrates

[17] Amendment of Part 31, Joint Dissenting Statement of Commissioners Joseph R. Fogarty and Anne P. Jones, 89 FCC2d 1109-1111 (1981).

that Congress intended FCC depreciation rules and policies to control the field.

Even if preemption were not explicitly mandated by Section 220(b), the effective implementation of our pro-competitive federal telecommunications policies dictates that inconsistent State depreciation regulation be preempted by this Commission. We cannot "defer to the States" on capital recovery issues. Telephone companies must be able to recover their costs of capital in a timely and effective manner if they are to price their services efficiently and to improve and expand their facilities to meet the challenges of competition and technologic innovation.

This preemption imperative is not merely theoretical. Too many States (e.g., Alabama, Louisiana, Nebraska, Ohio, New Jersey, Michigan, Arkansas) have already refused to recognize the critical necessity of the FCC's cost recovery principles. The resulting depreciation rate differentials are alarming: GTE of Ohio has indicated that it will be denied $7 million in capital recovery this year if the State of Ohio's disparate depreciation treatment is allowed to prevail.

The FCC cannot ignore the detrimental impacts of inconsistent State treatment of depreciation if our pro-competitive policies are to have any integrity and viability. This Commission now recognizes that preemption is both mandated as a matter of law and essential as a matter of policy, and our action today has my full endorsement and support.

ATTACHMENT B

Case No. 7661

Order No. 66114

In the Matter of the Application of the Chesapeake and Potomac Telephone Company of Maryland for Authority to Increase and Restructure its Schedule of Rates and Charges.

Before: Frank O. Heintz, William A. Badger, Lilo K. Schifter, Wayne B. Hamilton, and Haskell N. Arnold, Commissioners.

Issued: February 18, 1983

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APPEARANCES

J. William Sarver, D. Michael Stroud, Michael Morrissey, and Mark J. Mathis, for The Chesapeake and Potomac Telephone Company of Maryland.

James H. De Graffenreidt, Gregory V. Carmean, and Thomas C. Gorak, for the Office of People's Counsel.

Ronald A. Decker, and Bryan G. Moorhouse, for the Staff of the Public Service Commission of Maryland.

Varda N. Fink, for the State of Maryland, Department of General Services.

Robert R. Bair and John W. Hardwicke, for Maryland Industrial Group.

Harrison M. Robertson, Jr., for ADT Security Systems, et al.

Patsy Mullenix, for the General Services Administration.

Margaret Lee Quinn, Dennis K. Mancey, Dennis L. Myers, and David Worsley, for Telephone Answering Service Companies.

ORDER NO. 66114

Case No. 7661

In the Matter of the Application of The Chesapeake and Potomac Telephone Company of Maryland for Authority to Increase and Restructure its Schedule of Rates and Charges.

OPINION AND ORDER

Background

On July 26, 1982, The Chesapeake and Potomac Telephone Company of Maryland (hereinafter sometimes referred to as "C&P" or "Company") filed with the Commission an Application requesting authority to increase and restructure its schedule of rates and charges to become effective with service rendered on and after August 25, 1982. The revised rate schedules were designed to produce approximately $165,038,000 in additional gross annual revenues. During the proceedings the Company revised its request downward to $125,386,000, in order to reflect certain changed conditions.

By Order No. 65881, which was entered in this proceeding on July 29, 1982, the Public Service Commission of Maryland ("Commission") suspended the revised rate schedules for a period of 150 days from August 25, 1982, and instituted proceedings as to the justice and reasonableness of the proposed tariffs. Thereafter, by Order No. 66073, entered on January 4, 1983, the Commission extended the suspension period for an additional 30 days, for a total of 180 days, the maximum period authorized by law.

The Commission's Staff and The Office of People's Counsel ("OPC" or "People's Counsel") entered their respective appearances, and permission to intervene was granted to: the General Services Administration ("GSA"), Telephone Answering Service Customers ("TAS"); the State of Maryland, Department of General Services; the Maryland Industrial Group ("MIG"); and a number of companies intervening collectively as The Alarm Companies.

Testifying in support of the requested increases in rates were the following Company employees: J. Henry Butta, Vice President; David M. Gillis, Comptroller; Ethan Allen

Stenger, Division Manager — Programming; J. Lyman Anderson, Jr., Assistant Vice President — Costs and Economics Department; Joseph F. Agnich, District Staff Manager — Demand Analysis and Market Research; Ernest M. Sewell, Division Staff Manager — Corporate and Divestiture Plans; and Paul D. Kemp, Division Staff Manager — Regulatory Matters. Presenting additional testimony on behalf of C&P were: Thomas F. Clifford, Manager of Corporate Analysis in the Regulatory and Antitrust Matters Division of the Western Electric Company; Edward M. Dudley, Jr., Director — License Contract and Regulatory Matters at American Telephone & Telegraph Company ("AT&T"); Richard Walker, a certified public accountant with Arthur Anderson & Company; Hendrik S. Houthakker, the Henry Lee Professor of Economics at Harvard University; and Willard T. Carleton, and William R. Kenan, Jr., Professor of Business Administration at the University of North Carolina, Chapel Hill.

People's Counsel presented the testimony of Bruce M. Louiselle, Richard J. Lurito and Kenneth F. Gallagher of Kosh, Louiselle, Lurito & Associates; and John W. Wilson and Allen G. Buckalew of J. W. Wilson & Associates, Inc.

The Commission Staff presented Robert J. Henkes, Jamshed K. Madan and Richard J. Koda of the Georgetown Consulting Group; H. Joseph Ismail, the Commission's Chief Communications Engineer; and Sheldon Switzer, an economist in the Rate Research and Economics Division.

Several intervenors in these proceedings presented witnesses. The Maryland Industrial Group presented the testimony of Lee L. Selwyn, President, and Paul F. Levy, Senior Consultant, at Economics and Technology, Incorporated, and John J. Boland, Professor, Johns Hopkins University. Mark Langsam testified on behalf of the General Services Administration. Robert V. McNamara testified on behalf of the Telephone Answering Service

Customers. W. Kenneth Edward testified on behalf of The Alarm Companies. In addition, Lawrence H. Mitchell testified on behalf of the Attorney General for the State of Maryland.

In order to provide a convenient opportunity for customers of C&P to comment on the Company's Application, the commission advertised and held numerous public hearings throughout the Company's service territory.

The Commission has carefully considered all of the testimony, evidence, and argument which has been presented in this proceeding, and, in the discussion which follows, has resolved the various issues raised by the parties.

All parties agree that the 12-month period ending August 31, 1982 is the appropriate test year for use in this case. Since the parties have used this test period as the starting point in presenting their positions on the accounting issues, we find that the 12-month period ending August 31, 1982 is the appropriate test year for purposes of this proceeding.

I. Rate Base

All parties have presented average rate base calculations. The Company contends that its adjusted rate base averaged $1,515,769,000 over the test year; Staff presents an adjusted average rate base of $1,505,925,000; while People's Counsel maintains that it averaged $1,524,297,000. We now proceed to discuss and resolve the differences between the parties.

A. Accumulated Deferred Taxes.

Both C&P and Staff remove accumulated deferred taxes of $237,418,000 from the rate base, while People's Counsel decreases the rate base by $235,691,000 for this item. The difference between the parties occurs only because People's Counsel increases the ($237,418,000) amount by

$1,727,000 to reflect the amortization of deferred taxes resulting from the change in the Federal corporate income tax rate, while Staff and C&P reflect that item separately.

The adjustment for accumulated deferred taxes removes non-investor supplied capital from rate base; it is, therefore, an appropriate adjustment, as investors generally are not entitled to earn a return on capital which they have not provided. We will, therefore, accept Staff's and C&P's adjustment.

B. Reserve for Uncollectibles.

The record shows that each year C&P estimates the dollars in revenues which it should receive but will not receive during the upcoming year due to non-payment of telephone bills by its customers. C&P has followed this procedure for some undisclosed number of years. Company Exhibit 46 shows that a balance of $2,296,000 existed in the reserve for uncollectibles as of August 31, 1982, on a total Company basis. No figure for intrastate operations was supplied.

People's Counsel argues that the positive reserve balance demonstrates that C&P has overaccrued amounts from its ratepayers to cover billing amounts which it has written-off on its books. Mr. Louiselle expressed the opinion that the $2,296,000 represents customer, not investor, provided capital which is available to C&P for corporate purposes and on which investors should not be permitted to earn a return.

C&P responds by stating that the balance arises due to the delay (caused by collection efforts) in writing-off uncollectible accounts. According to Mr. Gillis:

> . . . The uncollectible reserve, however, provides no funds to the Company. Instead, it reflects the absence of a cash flow from current billings which will not be collected from customers in subsequent periods. After it has determined that the account is uncollectible, the write-offs or the charge to the reserve, will be made in subsequent periods. During the period from billing to write-offs, there are no funds available to the Company from this review. It is only the delay in writing-off these uncollectible accounts as collection efforts are pursued which causes the reserve balance; there has been no cash flow available to the Company.

In our opinion, C&P has not met its burden of proving that the facts support its position. Until such time as the Company can produce evidence showing that it is the continued lag in writing-off delinquent accounts which gives rise to the reserve, and that the reserve is not in excess of the amount of the continued lag, we will treat the amount in the reserve as customer, not investor, provided capital with respect to which C&P's investors are not entitled to a return.

As noted above, the reduction to rate base proposed by Mr. Louiselle is the amount in the reserve based on total Company operations. Since we are concerned solely with intrastate operations, it is inappropriate to deduct the full $2,296,000. Company Exhibit 46 shows test year accruals for uncollectibles on both a total Company, and an intrastate, basis. Applying the ratio between those two numbers (43.34 percent) to the total company reserve, we find it appropriate to deduct $995,086 from the rate base.

C. Expensing Station Connections.

C&P and Staff reduce rate base by $2,610,000 in conformance with this Commission's decision in *Re The Chesapeake and Potomac Telephone Company of Maryland,* Case No. 7591, Phase II, to employ a phase-in approach over a four-year period rather than a flash-cut solution in changing the accounting treatment for station connections. Since this adjustment is consistent with the corresponding adjustment to net operating income (see p. 22, *infra*), we find that C&P's rate base should be reduced by $2,610,000.

D. Western Electric Accounts Payable.

Staff Witness Henkes recommends that the Company's rate base be reduced by $15,930,000. This reflects the average test year payables (offset by the corresponding receivables) to Western Electric associated with capitalized purchases from Western Electric. The Company, as a part of its cash working capital calculation, reflects a reduction of $17,205,000 for the payment lag associated with the capitalized portion of Western Electric billings. This was offset by $1,075,000 to reflect the lag in receipt of Western Electric deferred taxes on such capitalized billings, for a net reduction of $16,130,000. People's Counsel did not make this adjustment.

Western Electric payables are a source of noninvestor supplied capital for the Company. As such, it is proper to remove this item from rate base since the Company is only entitled to a return on investor-supplied capital. The $15,930,000 adjustment proposed by Staff was computed in accordance with a similar adjustment which was accepted by the Commission in *Re The Chesapeake and Potomac Telephone Company of Maryland,* Case No. 7591, Order No. 65714, (March 24, 1982). For these reasons, the Commission finds Staff's adjustment to be appropriate, and it is accepted in this case.

E. Customer Deposits, Customer Advances, and Contractor Retentions.

The parties are in agreement that test year amounts for customer deposits $(5,134,000), customer advances $(1,379,000) and contractor retentions $(356,000) should be deducted from rate base. The Commission has viewed these items and concludes that the above deductions from rate base are appropriate, because they represent non-investor supplied capital on which investors are not entitled to a return. We state the amounts separately rather than include them in our discussion of cash working capital, below.

F. Cash Working Capital.

Calculations of the Company's cash working capital requirements were presented by Mr. Gillis, for C&P; Mr. Henkes, for Staff; and Mr. Louiselle, for People's Counsel. Preliminarily, we find that an allowance for working capital should be included in rate base to the extent that investors' cash funds are needed to pay for cash expenses prior to the receipt of revenues from customers. It is these funds on which the investor is entitled to a return. It is with this purpose in mind that the Commission has reviewed and analyzed the positions of the parties in order to determine the appropriate level of working capital to be included in the Company's rate base.

All parties are in agreement that C&P's materials and supplies balance averaged $16,299,000. As previously noted, we have dealt separately with customer deposits and advances, contractor retentions, and Western Electric Accounts Payable. Each of the above items shall be reflected outside of the cash-working capital discussion which follows.

Mr. Gillis develops C&P's cash working capital requirement through the use of what he called the "comprehensive" lead-lag method. He applies the revenue collection lag days to the average daily operating revenues and then applied the expense/tax payment lag to the average daily level of operating expenses and taxes. The difference represents cash working capital requirement. Unlike the other parties, C&P did not include the preferred dividend lag in its calculation. In computing its cash working capital calculation, the Company uses unadjusted "per books" dollar amounts. It should also be noted that the Company's computation of cash working capital reflects depreciation, deferred taxes, deferred Job Development Investment Tax Credits ("JDIC"), and common stock dividends. C&P calculates its cash working capital needs to be $53,921,000.

Mr. Louiselle computes the Company's cash working capital requirement through the use of a traditional lead-lag analysis. Mr. Louiselle relies on the various lag days provided by Mr. Gillis. The witness' recommendation is based upon the pro forma level of all of the Company's expenses. He also includes deductions reflecting the working capital effect of excise taxes, interest expense and preferred dividends. Mr. Louiselle determined that C&P requires $29,176,000 for cash working capital.

Mr. Henkes also computes the Company's cash working capital requirement by applying the net lag days to individual expense items. A difference between Mr. Henkes and Messrs. Louiselle and Gillis is that Mr. Henkes did not include a cash-on-hand balance in his working capital computation. Mr. Henkes has determined that C&P requires $30,131,000 for cash working capital.

In determining an appropriate allowance for cash working capital, the first issue raised concerns the methods used by the parties to calculate cash working capital. As previously mentioned, the Company proposes a new "comprehensive" lead-lag method. Both Staff and People's Counsel develop traditional lead-lag analysis. The method used by Staff and People's Counsel conforms to this Commission's previously stated preference for an itemized analysis of cash working capital needs. Through the use of an itemized analysis the relative timing of receipts and disbursements can be more accurately determined, and it is this relationship which gives rise to the need for cash working capital.

In our opinion, the Company's analysis reflects certain infirmities. The Company's computation of cash working capital reflects depreciation, deferred taxes, deferred JDIC and common stock dividends. In C&P's last case, Case No. 7591, we were quite clear in stating that we reject the inclusion of non-cash expenses because they do not create actual cash needs. In addition, the Commission stated therein that pro forma, rather than "per books," expenses

should be reflected in the computation of cash working capital. C&P's proposal in this case fails to use pro forma expense amounts.

Staff and People's Counsel both presented cash working capital studies in general conformance with this Commission's policies and practices. Aside from Mr. Louiselle's inclusion of an amount for cash-on-hand, which amount was not reflected by Mr. Henkes, the differences between Staff and People's Counsel generally can be ascribed to differences in their pro forma adjustments, and capital cost rates. In accordance with our decision in Case No. 7591, we will adopt a cash-working capital allowance consistent with Mr. Henkes' calculation. (See Appendix 1.)

G. Separation Changes: SPF, CPE.

The Company, Staff and People's Counsel all reduce C&P's net operating income by $639,000 for this adjustment, which accounts for the Federal Communications Commission's freeze on the value of the Subscriber Plant Factor and the phase-out of certain customer premises equipment from interstate operations. The Company and Staff also reduce rate base by $469,000 for this item; however, People's Counsel did not make this corresponding adjustment to rate base. The Commission has reviewed these proposed adjustments and accepts the rate base and income adjustments proposed by the Company and Staff.

H. Rate Base Findings.

Some adjustments to rate base will be discussed in the net operating income section of this Opinion, since the same adjustment may have both a rate base and income effect. In addition, another adjustment is discussed in the Computer Inquiry II section. After making the foregoing adjustments, we find that the fair value, for rate-making purposes, of C&P's intrastate property in rendering service to its customers averaged $1,505,988,000 during the 12-month period ended August 31, 1982. (See Appendix 2.)

A. Capital Recovery.

As in Case No. 7591, the Company proposes to cease use of the vintage group and whole life methods of depreciation and substitute depreciation rates for existing telephone plant based upon the remaining life method and for new outside plant and central office equipment based upon the equal life group method.

The Company asserts that the Federal Communications Commission's ("FCC") prescription of such rates requires their use for intrastate rate-making purposes. As authority for this proposition, the Company points to the recent Memorandum Opinion and Order of the FCC pre-empting State jurisdiction in this area,[18] as well as to certain other court decisions giving the FCC authority over aspects of the telecommunications' industry which have an effect intrastate.[19]

In addition, the Company maintains that even had the FCC not spoken, substantive reasons exist to justify the changes in methodologies. It is the Company's position that remaining life depreciation rates are required in order to allow C&P to recover the capital invested in Maryland telephone plant in its entirety and that equal life group depreciation rates are required to achieve an appropriate matching of capital recovery with capital consumption.

People's Counsel, MIG, and Staff vigorously oppose adoption of either the remaining life or equal life group methods of depreciation. Both OPC and Staff take issue with the FCC's authority to impose depreciation rates on

[18] Amendment of Part 31, CC. No. 79-105 (January 6, 1983).

[19] We are unpersuaded by the cases which the Company cites for the proposition that the courts have recognized the FCC's authority to pre-empt state commissions notwithstanding Section 2(b) of the Communications Act of 1934, 47 U.S.C. 152(b). These cases dealt with aspects of telephone service which are interstate by their very nature; e.g., FX/CCSA and interconnection policies.

state commissions where intrastate telephone service is involved. All three parties object to the changes due to the uncertainties surrounding C&P as a result of the upcoming divestiture. According to these parties, even if the proposed depreciation methodologies have theoretical advantages over the existing methodologies, in practice remaining life and equal life group depreciation will benefit the competitive (AT&T & American Bell, Inc.) subscriber and burden the monopoly (C&P) ratepayer.

Thus, two issues[20] regarding depreciation are presented for decision in this proceeding: 1) whether this Commission is empowered to adopt for intrastate rate-making purposes any depreciation rates other than those prescribed by the FCC; and 2) if the FCC's action does not limit this Commission, whether it should adopt the remaining life and equal life group methodologies.

We will address the threshold question first. It is settled that state commissions may establish depreciation rates (and therefore methodologies) in the absence of federally-prescribed rates.[21] However, the Supreme Court has expressly reserved judgment as to the effect on state commissions of depreciation rates prescribed by a Federal commission.[22]

All parties to this case, as well as the FCC, agree that the standard set forth in *Florida Lime and Avocado Growers v. Paul*[23] should govern the resolution of this issue. As in Case No. 7591, we continue to agree with this analysis. The *Avocado Growers* standard requires that there be either persuasive evidence that the nature of the subject matter permits no other conclusion than that state

[20] We extensively analyzed these same issues in Case No. 7591. By this opinion, we fully adopt our reasoning as expressed in the former proceeding.

[21] *Northwestern Bell Telephone Co. v. Nebraska State Ry. Commission,* 297 U.S. 471 (1936).

[22] *Id.* at 478.

[23] 373 U.S. 132 (1963).

regulatory power has been pre-empted, or that Congress has unmistakably ordained such pre-emption.[24]

The Company, by its reliance on the FCC pre-emption order, maintains that in the matter of Federal prescription of depreciation rates, both criteria are met.

With regard to the first aspect of the standard, the FCC advances the claim that state prescription of depreciation rates and methods would frustrate the Federal policy of making available ". . . so far as possible, to all people of the United States a rapid, efficient, nation-wide, world-wide, wire and radio communication service with adequate facilities at reasonable charges. . . ."[25] The FCC states that pre-emption is necessary to further the goal of affordable universal service. It reasons that competition is desirable in certain markets, that its depreciation methodologies will foster this Federal policy, and that proper price signals, generated by the dynamics of supply and demand, are necessary to encourage competition. Because most plant is used interchangeably to provide interstate and intrastate services, supply and demand for telephone products and services are determined by the combination of inputs from both state and Federal regulatory jurisdictions. Thus, the FCC states that any depreciation rates or methodologies at variance with those determined by the FCC could affect the efficiency of the market place by providing for less-than-adequate capital recovery by the regulated utility.[26]

Recognizing the deference to which the FCC is entitled in interpreting its own enabling legislation,[27] we cannot accept this analysis as a reasonable reading of its responsibility to provide universal service at reasonable rates.

[24] *Id.* at 142.

[25] Amendment of Part 31, *supra*, at 13.

[26] *Id.* at 12-16.

[27] *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971).

By the FCC's own admission, depreciation will affect the net book value of assets and thus the gain or loss[28] realized upon their transfer from the monopolistic state-regulated entity to the competitive entity. The FCC also acknowledges that depreciation is an important part of the revenue requirement of the state-regulated telephone companies; thus, depreciation rates are important in determining the prices at which services are offered. Nonetheless, the FCC asserts that placement of the monetary burden of fostering competitive services interstate on the non-causative captive intrastate ratepayer is justified by administrative ease and technological growth within the industry.[29] The FCC maintains that this shifting of an identifiable economic burden does not infringe on the states' authority to set rates.

To this Commission, this appears to go beyond the "Shreveport Doctrine".[30] The FCC would not merely raise intrastate rates so as to avoid unreasonable discrimination against interstate commerce. By its action the FCC would raise intrastate rates in order to lower interstate rates. This is not a result intended under the Communications Act of 1934 ("the Act").[31]

With regard to the FCC's assertion that its action does not infringe on the states' rate-making authority and need not affect rates, we note that ratemaking is more than the adoption of a tariff. Principles govern the return to which C&P is entitled and should the Company's expenses

[28] The record in this case is clear. For C&P adoption of these depreciation methodologies indicates a loss for the Company when the assets are transferred relative to what would be realized should current methodologies be retained.

[29] Amendment of Part 31, *supra*, at 14.

[30] *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342 (1914).

[31] *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1047 (4th Cir.), *cert. den.*, 434 U.S. 874 (1977).

increase, the principles governing the return remain unchanged.[32]

We see no evidence, either in the FCC's order or elsewhere, that the rates established by this Commission for the limited services subject to our jurisdiction can frustrate the Federal goal of promoting competition in the long distance market. The rates we establish are intended to cover the costs associated with the services we regulate. Since these services differ from those which the FCC seeks to promote, we do not see any effect upon Federal policy as a result of rate-making decisions which are limited in scope to those services subject to state jurisdiction. Furthermore, we also note that the increase in rates for basic local services which would result from adoption of the revised depreciation practices may well serve to frustrate the Federal policy of promoting universal service.

As to the second standard under *Florida Avocado Growers*, the Company again, through its reliance on the FCC Pre-emption Order, cities statutory construction as well as legislative history for the proposition that Congress has unmistakably intended that the FCC pre-empt state commissions with regard to prescription of depreciation rates.

In its Order, the FCC maintains that Section 220(b) in combination with Sections 220(i) and 220(j) of the Act compels the conclusion that Federal pre-emption of the area was intended. In Case No. 7591, the Company raised an argument similar to the reasoning adopted by the FCC. In our Opinion in Case No. 7591, we noted that ". . . the absence of an express reservation of state authority does not unmistakably evidence a Congressional intention to pre-empt the field. Rather, the absence of an express and unambiguous limitation on state authority compels the conclusion that Federal pre-emption of the field was not intended.[33]

[32] *Federal Power Commission v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944); *Bluefield W.W. & Improvement Co. v. Public Service Commission*, 262 U.S. 683 (1923).

In that same order we discussed at length the legislative history advanced to support the claim that Congress intended the FCC to have exclusive authority over depreciation rates for both interstate and intrastate purposes. Neither our reasoning nor our conclusion that ". . . there is no indication in the legislative history of the Act, or in other provisions of the Act itself, that Congress intended such a result. . . ."[34] has changed. We note, however, that the FCC's earlier opinion stated that the legislative history on which it has now relied was "inconclusive."[35] Even in its latest opinion, the FCC finds the history to be "not dispositive"[36] (although leaning more towards than against a broad pre-emption position).

For these reasons, we conclude that the depreciation practices established by the FCC in no way limit this Commission's authority to independently determine the appropriate level of depreciation expense to be reflected in intrastate rates for telephone service.

We turn now to a consideration of the merits of the various methodologies proposed by the Company. It is C&P's position that the remaining life method is superior to the whole life method because it allows for constant readjusting of estimates of service lives thus dealing with the continuously changing conditions brought about by changes in technology and competition. The Company further maintains that equal life group ("ELG") is a superior method to vintage group because it: (1) more closely fits the cost allocation to the period of benefit; (2) it does not create large shortfalls in depreciation of the

[33] *Re The Chesapeake and Potomac Telephone Company of Maryland*, Case No. 7591, Order No. 65714 (March 24, 1982), p. 26.

[34] *Id.* at 28.

[35] Amendment of Part 31, *supra* at 6.

[36] *Id.* at 7.

less-than-average-life property to be made up by extra depreciation of the longer-than-average-life property in the group, and; (3) being more accurate as time passes, it can more readily accommodate large changes in technology as there is less likelihood of large accumulations of under-depreciation.

People's Counsel, through Mr. Louiselle, does not quarrel with the theory underlying the depreciation methodologies. Rather it is his position that absent a need for an infusion of internally generated capital or a seriously deficient reserve for depreciation — which situations he stated do not apply to C&P — a change to such methodologies is unjustified in light of the recently represcribed whole life rates and the impending divestiture. On brief, People's Counsel emphasized that any remaining life depreciation changes implemented will relate primarily to plant that C&P will transfer to American Bell, Inc. ("ABI"); accordingly, C&P's goal of matching vintage year customers will not be realized by C&P ratepayers. With regard to ELG, People's Counsel noted on brief that technological change should not be reflected in rates before that change occurs. According to People's Counsel, to do so violates the capital consumption theory proposed by the Company. In sum, it is the position of People's Counsel that the benefits of the proposed depreciation methodologies will not materialize while the costs to ratepayers will be significant.

Staff's Witness Madan objected to adoption of remaining life depreciation on the ground that the effect of adopting such a method is to lower the net value of assets to which it applies, thus increasing the revenue requirement to be paid by C&P ratepayers now and decreasing the amount to be received from AT&T at divestiture. On brief, Staff highlighted Mr. Walker's concession on cross-examination that remaining life and equal life group are superior depreciation methodologies only if the lives are accurate — the estimation of those lives being a process in which there is room for error.

Testifying for MIG, Paul F. Levy stated that ". . . [f]or the purposes of this proceeding, the [anti-trust] settlement removes the capital recovery problem as a *rate-making* issue for the terminal equipment and other assets to be transferred to AT&T at the time of divestiture." According to Mr. Levy, since C&P will receive full recovery of its invested capital at the time of divestiture, the Commission's primary concern should be the effect of the various depreciation proposals on the existing general body of ratepayers. On brief, MIG pointed out that as a result of represcribed whole life rates in Case No. 7591, C&P has implemented substantial increases in depreciation charges. MIG notes that: (1) the burden to current ratepayers of higher appreciation accruals in the early years occasioned by remaining life and equal life group techniques will not (because of divestiture) be offset by the benefit of smaller accruals charged the ratepayers in the later years; (2) remaining lives and group lives are merely negotiated estimates which are set once every three years; should these estimates result in underrecovery due to error, the net undepreciated investment is still on the books and the investor is still treated fairly by receipt of a fair return, whereas there is no provision to reimburse the current ratepayer upon any overrecovery due to erroneous estimates and upon divestiture and transfer of assets; (3) increased depreciation rates due to shortened lives will increase customer migration to the Flagship products being marketed by ABI, and; (4) that C&P's depreciation proposals are part of an AT&T program to increase internally generated capital to support AT&T's competitive operations.

In Case No. 7591, we stated our rationale for rejecting the remaining life and equal life group methods of depreciation as follows:

> . . . there is no compelling need to change depreciation practices in this proceeding in such a way as to accelerate the recovery of capital. Given the impending restructuring of the telephone industry, the relationship between AT&T's base

> migration strategy and its capital recovery proposals, and the lack of a demonstrated superiority of those proposals, we find that the Company's test year depreciation expense should not be adjusted to reflect the effect of revised depreciation methodologies.

We find the reasoning even more valid in this proceeding than it was in Case No. 7591.

No party to this proceeding would disagree that this is a unique period for the telecommunications industry. A decision to adopt the depreciation proposals advanced by the Company cannot rest solely on an analysis of the purported merits of those proposals, since divestiture will substantially affect the actual impact of the alternative depreciation methods. The remaining life method is intended to apply primarily to terminal equipment; i.e., equipment which will be transferred from C&P by 1984. Acceptance of the remaining life proposal would not only support AT&T's base migration strategy but would burden present C&P ratepayers in exchange for a benefit which they could not receive from the Company in the future.

The equal life group method of depreciation appears to offer a more accurate method to evaluate service lives. However, we cannot evaluate this or the remaining life proposal in isolation from the effect of the restructuring of AT&T. For these reasons, we reject the Company's proposals to adopt remaining life and equal life group depreciation. Accordingly, no adjustments will be made to rate base or net operating income for these items.

B. Expensing Station Connections.

In Case No. 7591, we ordered C&P to begin expensing station connection costs. In Phase I of that proceeding, we reflected in rates the first phase of a four-year phase-in period. Thus, 25 percent of station connection costs were expensed, and the remaining 75 percent were capitalized. Subsequently, use of the phase-in approach was reaffirmed in Phase II of Case No. 7591.

In this proceeding, C&P and People's Counsel decrease net operating income by $10,302,000 in conformance with the continuing process to expense, rather than capitalize, increasingly greater portions of station connection costs. Their adjustments are consistent with our actions in Case No. 7591, Phase II. It is the position of Staff, however, to flow through the accumulated unamortized investment tax credits associated with capitalized station connections over a three-year period rather than the ten-year period previously authorized. Accordingly, Staff reduced test year income by $6,305,000.

We find that the tax credits should be returned to ratepayers at the same rate over which the capitalized costs are amortized (a 10-year period). Accordingly, we accept the Company's and People's Counsel's adjustment.

C. Wage, Salary and Benefit Increases.

1. Wage and Salary Increases

The Company makes a three-part adjustment to test year operating expenses to annualize three wage and salary increases. The first part of the adjustment reflects the portions of the various annual expenses, not included in the test year, for the monthly salary increases effective prior to September 1982 and the general wage increase effective in August 1982. The general wage increase effective in August 1982 has occurred pursuant to the provisions of the 1980 General Agreement with the Communications Workers of America. The second part reflects the full impact of the January 1983 increases in pensions and vision care allowances negotiated as part of the 1980 General Agreement, and the increases in salary expense effective during the period September 1982 thru February 1983. The third part reflects the portions of the salary expense increases effective March 1983 thru February 1984, and wage expense increases effective August 1983 which will be realized during the first year of new rates. In sum, C&P is requesting all wage and salary increases through February 1984, which will be the entire first year revised rates would be in effect.

Staff recommends that if C&P's pro forma wage and salary adjustments are accepted by this Commission, it is appropriate that they be offset by a labor productivity increase of 2.5 percent.

People's Counsel presents the Commission with two alternative positions with respect to this issue of wage and salary increases. The first alternative is for the Commission to reject all wage and salary increases after December 31, 1982 due to the uncertainty of the impact Computer Inquiry II ("CI-II") will have on the Company's operations. The other alternative presented by People's Counsel Witness Louiselle, is to include the pre-August 1983 contracted-for wage and salary increases along with a CI-II adjustment specifically developed by Mr. Louiselle.

After careful consideration of this matter, the Commission concludes that the adjustments for wage and salary increases proposed by C&P — excepting the August 1983 wage increase — should be accepted. Accordingly, net operating income will be decreased by $15,612,000 to reflect the total of these adjustments.

In making this determination, the Commission is mindful of its following statement in C&P's last base rate case:

> . . . it is reasonable to reflect wage and salary expense incurred by the Company during the first year revised rates are in effect.

In reaching that conclusion, however, we made it quite clear that the crucial aspect of the issue concerning pro forma wage and salary expense increases is "whether the adjustment provides a fair representation of conditions as they will exist during a reasonable future period." Under the present circumstances, with the limited information available as to the full impact of CI-II and divestiture on Company operations, as well as the unknown effect of the present economic conditions upon wage negotiations, we cannot find at this time that the Company's August 1983

wage increase adjustment provides a fair representation of conditions as they will exist during the future.

With regard to Mr. Madan's labor productivity offset, we have rejected making such an adjustment in the last two C&P cases because of our concern that to do so would have exacerbated the problem of the Company failing to earn its authorized rate of return. Given the fact that the record reflects that the Company has failed once again to earn its authorized rate of return and in view of the uncertainties of the full impact of CI-II and divestiture, we conclude such an adjustment is not appropriate at this time.

2. Benefit Plan Changes.

The Company makes an adjustment to annualize Benefit Plan Changes taking effect in January of 1982. Staff makes a similar adjustment which differs only because it includes a labor productivity offset. In People's Counsel's adjustment Mr. Louiselle removes the effect of a refund of insurance premiums booked in the test year although paid in the prior year. Mr. Louiselle states his belief that since these premiums were collected from customers, it is they who should receive the benefit of the refund.

The record reflects that the refunds resulted because of a change in insurance carriers by the Company. Premiums paid to the original insurance carrier to pay future employee claims were refunded when the insurance carrier was replaced by another. We agree with the Company that since this is an event which will not be repeated when new rates are in effect, and since the Company failed to realize its authorized rate of return at the time the refunds were made, such an adjustment should not be accepted. Accordingly, we will accept the Company's adjustment reducing net operating income by the amount of $1,747,000.

D. Payroll Tax Changes.

The Company makes an adjustment to decrease net operating income by $231,000 to reflect changes in State, local and other taxes. Consistent with his adjustment to wages, Mr. Louiselle only reflects in his adjustment those increases as they affect 1982 expenses. Staff Witness Henkes' adjustment decreasing net operating income by $280,000 differs from the Company in that he took into consideration the actual changes in social security base and Federal unemployment rates which became effective January 1, 1983. The Company estimates the impact of those changes.

Since Mr. Henkes' adjustment reflects the actual changes, it will be accepted.

E. Amortization of Surplus Deferred Federal Income Tax ("DFIT").

The Company's reserve for deferred Federal income taxes was accrued at the statutory Federal income tax rate of 48 percent. Effective January 1, 1979, this rate was reduced to 46 percent. As a result of this reduction in the tax rate, the Company's accumulated provision for deferred income taxes exceeded its ultimate tax liability by $5,757,000. In Case No. 7591, we concluded that an amortization of the surplus over a five-year period was appropriate.

People's Counsel makes an adjustment increasing net operating income by $1,151,000 to reflect a five-year amortization of this excess deferred tax.

Staff is in accord with the Commission's policy of accelerated flow back of the excess deferred tax; however, Mr. Henkes avers that additional facts exist which were not available when Case No. 7591 was decided. Mr. Henkes testified that because of the spin-off and transfer of assets to AT&T, there is a possibility that C&P ratepayers will not receive the entire surplus amounts that they have paid to the Company. To the extent that

assets are transferred to AT&T, either under Computer Inquiry II or under the Divestiture Consent Decree, the associated excess deferred tax will be transferred with the asset. To avoid this result, Staff recommends amortizing the existing unamortized excess tax balance over a period of one and one-half years. Thus, Staff's adjustment to the test year net operating income, amounts to $2,913,000.

The Company requests that this Commission reconsider our decision in Case No. 7591 on this issue, therefore no adjustment to net operating income is made by C&P.

Upon reconsideration of this matter, we conclude that the adjustment proposed by Staff is appropriate. An amortization period of one and one-half years will negate the possibility of ratepayers not receiving the entire unamortized balance. The adjustment proposed by Staff, increasing net operating income by $2,913,000, is, therefore, accepted.

A concomitant adjustment to rate base is necessary to reflect the pro forma reduction in the Company's deferred tax balance resulting from the operating income adjustment to amortize the Company's excess deferred taxes over a one and one-half year period. The Commission finds it appropriate to accept Staff's adjustment and will, therefore, increase rate base by $2,608,000.

F. Tax Effect of Pro Forma Interest.

The Company, Staff and People's Counsel each make an adjustment to operating income to synchronize the interest expense implicit in the authorized rate of return with that used in computing test year income taxes. Each of the parties' adjustments differ, however, because of their reliance on their own rate of return and rate base recommendations. Additionally the Company's adjustment differs in that it identifies unamortized Job Development Investment Tax Credits as a separate and distinct part of the capital structure used in determining the cost of capital.

The Company's adjustment as it relates to the investment tax credits has been rejected by this Commission in the Company's last two rate cases. See *Re The Chesapeake and Potomac Telephone Company of Maryland,* Case No. 7467, Order No. 65112, (Md. Pub. Serv. Comm'n, January 29, 1981), and *Re The Chesapeake and Potomac Telephone Company of Maryland,* Case No. 7591, Order No. 65714, (Md. Pub. Serv. Comm'n, March 24, 1982). The Staff and People's Counsel propose the methodology which this Commission has consistently used to determine the pro forma interest adjustment. Based on the record in this case as well as our decisions in the prior two C&P cases on this issue we once again decline to accept C&P's proposed adjustment.

Accordingly, the adjustment proposed by Staff and People's Counsel will be adopted whereby the Company's test year income taxes will be adjusted to reflect the level of interest expense included in the return.

G. Interest During Construction.

Consistent with past Commission policy, the Company, Staff and People's Counsel recommend that interest during construction ("IDC") accrued during the test year on both long- and short-term Plant Under Construction be reflected as an offset to the cost of service for rate-making purposes. Accordingly, each of the parties make pro forma adjustments, consistent with the Commission Order in Case No. 7335, to reflect IDC on short-term Plant Under Construction which is accrued off books by the Company. The Staff's adjustment is identical to the Company's. People's Counsel, however, proposes further to adjust test year IDC downward to reflect an accrual rate of 11.61, consistent with the rate of return recommended by Dr. Lurito. Mr. Louiselle testified that the cost of capital for construction should be the same as the cost of any other capital and he, therefore, contends that long-term and short-term IDC should be reflected at the rate of return authorized in this proceeding.

Having considered this matter, the Commission prefers the use of test-year data, rather than a pro forma adjustment. Accordingly, and in view of our rate of return determination, we will accept the adjustment as proposed by Company and Staff thereby increasing net operating income by $3,289,000.

H. Expensing of Minor Purchases.

The Company and Staff propose an adjustment to decrease net operating income reflecting the impact of the change from $50 to $200 in the limitation for expensing minor items such as small tools and office equipment.

People's Counsel takes exception with that portion of the Company's and Staff's adjustment which pertains to minor items, costing more than $50 but less than $200, which were purchased in the recent past. The Company and the Staff proposed to amortize the capitalized cost of these items. People's Counsel Witness Louiselle believes that to allow this portion of the adjustment would be retroactive rate making.

Having considered the evidence presented on this matter, we conclude that the adjustment in the amount of $489,000 as proposed by the Company and Staff is appropriate.

I. Reorganization.

The Company proposes an adjustment to increase net operating income to reflect savings from C&P's management reorganization. In Staff's adjustment, Mr. Henkes uses flash-cut expensing and does not revise his adjustment as a result of the phase-in ordered in Phase II of Case No. 7591. People's Counsel, consistent with its wage related adjustments, reflects only those savings to be experienced through December 31, 1982.

After considering the evidence presented on this matter, we accept the adjustment proposed by the Company and accordingly increase net operating income by $1,380,000.

J. Removal of Out-of-Period License Contract.

All parties agree that an adjustment should be made to test period operating income to reflect reimbursement for out-of-period General Service and License ("GS&L") expenses. However, the parties differ as to the amount of that adjustment. The refunds which were booked in October and December 1981 as credits to GS&L expense relate to costs incurred by the Company for the period March through August 1981. The Company would remove from operating income $338,000, the entire out-of-period booking, for the simple reason that the credits are related to expenses incurred outside the test period. Staff has accepted the Company's adjustment.

People's Counsel, however, asserts that only $27,000, the amount booked in December 1981, should be deducted from operating income. According to OPC's Witness Louiselle, this booking represents typical "on-going true-ups" the removal of which from net operating income is consistent with past Commission approved treatment. Mr. Louiselle maintains that the amount booked by the Company for this item in October reflects a refund of License Contract costs paid by C&P relating to AT&T General Department Activities incurred in the formation of American Bell Incorporated ("ABI").

We agree with People's Counsel that since the Company has attempted to relieve its ratepayers of ABI-related costs, consistency requires that refunds such as this one be returned to ratepayers. The Company failed to respond either in rebuttal testimony, on brief, or at oral argument to Mr. Louiselle's characterization of the October booking. For this reason, we will accept OPC's adjustment and will decrease operating income by $27,000 to account for retroactive license contract billings.

While the refund in question was received during the test year in this case, the record indicates that subsequent to the close of the test year C&P has received and expects to receive in the future additional License Contract

refunds from AT&T for ABI-related expenses. The intrastate portion of ABI-related expense reimbursements received on December 12, 1982 is estimated by the Company at $4,957,651. According to the Company, only $1,527,474 of that amount is applicable to the test period in this case and has been included in the CI-II adjustment. These and other refunds will be considered in our future determination as to what extent the License Contract costs which were deferred in this and the prior case should be amortized to the services remaining with C&P after divestiture.

K. License Contract Fees.

The reasonableness of the License Contract fees for ratemaking is at issue in this proceeding, as it was in C&P's last several rate cases. In this proceeding, however, we are faced with two additional inquiries. First, to what extent will the License Contract fees which were charged to C&P during the test year be representative of License Contract fees which will be billed to C&P during the rate-effective period? Secondly, to what extent will the fees constitute compensation for services provided under the Contract which will benefit the Maryland ratepayers?

In recognition by AT&T that those License Contract fees which were incurred in the formation or for the benefit of American Bell, Inc. should not be charged to the Maryland intrastate ratepayers, C&P has received and is expected to receive refunds from AT&T for License Contract expense related to the test year License Contract billings. While certain test year related refunds appropriately have been accounted for in the Subsidiary Formation and CI-II adjustments, the level of License Contract fees or the services provided during the rate effective period which encompasses the remaining months in the life of the License Contract Agreement, is less than known and certain.

In C&P's last rate proceeding, Case No. 7591, we excluded from intrastate test year expense certain License

Contract items. Specifically, we excluded charges associated with the Department of Justice's antitrust suit, charges primarily related to holding company activities, and 40 percent of the research and systems engineering expense allocated to C&P's intrastate operations.

In this proceeding, as in the past, C&P claims it has demonstrated that its License Contract Expense is reasonable, that it has fully adjusted its License Contract expense to reflect the impact of CI-II and that any disallowances of License Contract expenses due to divestiture would be inappropriate. Furthermore, C&P argues again that research and systems engineering funded by the License Contract is not product related and should not be disallowed.

People's Counsel proposes two alternative approaches for handling License Contract fees. The first approach, which is the preferred position of People's Counsel, was presented by Mr. Buckalew. He recommends that C&P be limited to paying only 1 percent of its revenues (less uncollectibles) to AT&T for its share of license contract expenses instead of the current ceiling of 2.5 percent. People's Counsel contends that this constraint is critical during the current transitional period to protect Maryland ratepayers from bearing part of the cost of financing AT&T's competitive endeavors. As an alternative approach, People's Counsel Witness Louiselle presents adjustments to net operating income which reflect the Commission's disposition of the License Contract fees in Case No. 7591. That is, he removes from test year expenses charges associated with the Department of Justice's antitrust suit and 40 percent of the research and systems engineering expenses ("R&SE") allocated to C&P's intrastate operations (while capitalizing the remaining 60 percent as an addition to rate base).

MIG Witness Levy proposes a "middle ground" between total acceptance and total disallowance by this Commission of all Affiliated Interest expense. Mr. Levy testified

that license contract, business information systems, conduit billing and cost sharing are funded, in large part, currently and by ratepayers. Given the fact divestiture means that AT&T will benefit from the activities funded by these sources (and that C&P will no longer benefit), he states that ratepayers should no longer pay for this work, unless C&P provides an accounting of these costs showing the benefits to (a) the ratepayers, and (b) the stockholders. In the alternative, he suggests that C&P maintain a separate account, similar to a CWIP account, in which Affiliated Interest charges would accumulate. Carrying charges, similar to AFUDC, would also accumulate. An allocation of the costs in this account could be made once the reorganization plans are known with more certainty.

Staff Witness Koda recommends several disallowances and deferrals based upon his investigation and analysis of the work activities underlying the various License Contract charges. Mr. Koda relies heavily upon Budget Decision Packages ("BDP's") which he testified are the only documents which provide disaggregated cost data for specific activities undertaken by the General Department of AT&T. Specifically, Mr. Koda recommends the following adjustments to the Company's License Contract Fees: (1) disallow $225,000 pertaining to parent related costs; (2) disallow $187,000 of expenses arising from activities that benefit the fully separated subsidiary; (3) disallow $586,000 of expenses which are of little or no benefit to Maryland ratepayers, that is specifically, the Department of Justice antitrust suit and the New York State Franchise Tax; (4) disallow $2,570,000 or 36.7 percent of all R&SE expenses allocated to C&P which primarily benefit product manufacturers and non-regulated Bell entities; (5) capitalize and amortize (over 10 years) that portion of R&SE expenses not disallowed rather than expensing them on a current basis. Finally, Mr. Koda recommends an adjustment for non-License allocations and general exclusion in the amount of $1,042,000. In sum, Mr. Koda's various adjustments to the

Company's License contract fees results in a net-of-tax increase of $3,362,000 to net operating income.

Also, in addition to Mr. Koda's recommendations, Staff Witness Henkes presents a separate adjustment in the amount of $98,000 to reflect an exclusion from test year operating expenses the Company's allocated share of AT&T's corporate-informative advertising. Staff's position is that such advertising does not result in a direct benefit to Maryland ratepayers. This contention was not rebutted by the Company.

As noted above, in C&P's last rate case we excluded License Contract charges associated with the antitrust suit and parent Company activities as well as General Department expenses assignable to the fully separated subsidiary, as recommended by Mr. Koda. In that proceeding, as well as previous proceedings, we noted that we have rejected the Company's contention that the type of evidence which it has presented establishes the reasonableness and prudence of *all* expenditures incurred under the License Contract. We reject that contention once again as it relates to all those expenses recommended for disallowance by Staff Witnesses Koda and Henkes. Our review of the evidence convinces us that the underlying activities associated with these expenditures are of such a nature that they should not be borne by this State's ratepayers. Thus, Messrs. Koda's and Henkes' adjustments of $3,362,000 and $98,000, respectively, shall be accepted.

In Case No. 7591, we determined that 40 percent of the R&SE expense which was allocated to C&P through the License Contract should be disallowed as an expense for intrastate rate making and be allocated to Western Electric and activities which will benefit the newly formed subsidiary.

Mr. Louiselle supports continuation of disallowance of 40 percent. Mr. Koda, based on his analysis of the BDP's, recommends in this case that a minimum of 36.7 percent

of R&SE expense should be disallowed. We shall continue our policy of excluding a portion of R&SE expense which represents that portion of the expense that benefits product manufactures and non-regulated Bell entities. Accordingly, we will disallow 36.7 percent of R&SE expense as proposed by Mr. Koda since his analysis reflects the most updated information available.

With respect to the remaining 63.3 percent of R&SE expenses, in Case No. 7591, the Commission determined that in light of the impending restructuring of the Bell System, these costs should be deferred and included in rate base in order to provide a return pending final disposition.

As we stated in Case No. 7591:

> Deferral of the recovery through capitalization and amortization will enable the Commission to defer a ruling on the ultimate disposition of this expense to a point in time when the restructuring may more clearly indicate the appropriate treatment. Thus, the future course of events may result in exclusion of this expense, its rapid recovery, or a continuation of the treatment adopted herein.

Thus, while we authorize capitalization and one year's amortization of previously deferred R&SE expense for inclusion in test year results in this case, we will examine in future cases to what extent the deferred License Contract fees should be fully amortized to the services remaining with C&P, or to what extent these items should be transferred from C&P at the time of divestiture. Accordingly, with respect to our decision in this case, rate base shall be adjusted by $3,546,000 to reflect the proper amount of R&SE to be capitalized net of deferred tax.

L. Business Information Systems ("BIS").

The inclusion of Business Information Systems expenditures in the Company's cost of service is at issue in this proceeding. As in past proceedings, Mr. Butta testified

with regard to this program and the Company's participation. As he has noted in the past, Mr. Butta explained that these Business Information Systems are computer software programs developed by Bell Labs for C&P and other participating operating telephone companies, to control operating costs and capital expenditures, improve customer service, enhance plant utilization, automate business records, and provide information necessary for effective management. Mr. Butta further notes that without central development through Bell Labs, of these Business Information Systems, C&P would have to incur the significant additional cost of hiring a substantial number of computer programmers to develop this software.

People's Counsel's Witness Louiselle recommends that all BIS expenditures be removed from operating expenses and capitalized subject to a 10-year amortization. He also recommends that the capitalized portion be reflected in rate base, net of deferred taxes to enable the Company to earn a return on the BIS expenditures. Mr. Louiselle explained that the purpose of his adjustment is to allow the commission flexibility to assess the benefits of the BIS projects at a future time. In this way, ratepayers will be relieved from funding BIS projects in which they receive little or no benefit and consequently be charged only for those costs which do benefit them. Mr. Louiselle's concern that some BIS projects may not benefit Maryland ratepayers arises out of the creation of ABI and divestiture. The witness expresses his belief that many systems currently funded by C&P may provide substantial benefit only to ABI or AT&T.

Staff Witness Koda likewise testified that certain BIS projects currently being charged to C&P have not been implemented in the Bell System while still others have been available for some time but never implemented by C&P. Accordingly, Staff recommends that costs for those BIS projects identified by Mr. Koda which will not be used should be disallowed from the Company's revenue re-

quirement. Also, those costs associated with the BIS projects identified by Mr. Koda that will be used sometime in the future should be deferred until put in service and then amortized for 10 years. Additionally, Mr. Koda recommends that certain BIS systems relating to customer premises equipment for businesses should be disallowed in view of the limitations upon C&P resulting from the CI-II decision effective January 1, 1983.

Although the Commission has allowed C&P to fully expense all BIS projects, in Case No. 7467 we noted our concern with the rapid growth of these expenditures and stated that we would closely scrutinize both the amount and purpose of such expenditures in the future. While we agree with the Company's basic position that BIS projects in general are beneficial to C&P and its ratepayers, the Company has nevertheless failed to rebut the contentions raised by People's Counsel and Staff regarding specific BIS projects that will be of little or no benefit to C&P and its Maryland ratepayers.

Accordingly, after consideration of the evidence and arguments presented with regard to this issue, we find that all those specific BIS projects identified by Mr. Koda either for disallowance or deferral should be removed from operating expenses and capitalized net of deferred taxes. In future cases, we will reexamine these deferred BIS expenditures to determine to what extent they should be fully amortized to the services remaining with C&P, or to what extent these items should be transferred from C&P at the time of divestiture.

Thus net operating income will be increased by $605,000 and the corresponding adjustment will increase rate base by the same amount.

M. Conduit and Cost Sharing Charges.

Unlike the License Contract, participation in a Cost Sharing Agreement by a specific Bell Operating Company such as C&P is left to the discretion of the operating

company. The Conduit Arrangement covers third party or vendor services, such as insurance and advertising, which are purchased centrally by AT&T for operating companies.

Staff Witness Koda, upon analyzing cost sharing and conduit charges paid to AT&T by C&P, concludes that certain charges should be removed from C&P's cost of service because they will inure to the benefit of AT&T's unregulated entities. On brief, People's Counsel supports Mr. Koda's adjustments on this issue.

Essentially, Mr. Koda proposes disallowing the costs of projects pertaining to marketing of ABI products and activities which focus on maintaining or improving AT&T's corporate image. In recognizing that C&P will receive some benefit from AT&T's national advertising geared towards improving its image and achieving overall communications awareness, Mr. Koda proposes disallowing only 50 percent of these charges.

The record reflects that the Company did not rebut the proposed Conduit and Cost Sharing adjustments of Mr. Koda. After considering the evidence on the record with respect to this matter, we conclude that Mr. Koda's disallowance adjustments in the amount of $734,000 should be accepted.

N. Subsidiary Formation Costs.

The Company, Staff and People's Counsel concur that test year intrastate results should be adjusted so that those Company expenses which are related to activities associated with CI-II and incurred during the test year are removed. Removal of these expenses for rate-making purposes is consistent with the treatment accorded them in Case No. 7591. For this reason, C&P credited $601,000 to operating income to reflect the cost of subsidiary formation and enhanced services. Staff accepted the Company's adjustment. People's Counsel only reflected $223,000 as subsidiary formation costs.

It appears, however, that the major portion of the difference for this adjustment between OPC and the Company and Staff is included in Mr. Louiselle's "License Contract Disallowance R&SE Net" calculation. We will accept the adjustment as proposed and reflected by the Company and Staff.

O. Net Operating Income Findings

After making all the aforementioned adjustments, and, including those adjustments which impact upon net operating income and were made under the Rate Base and Computer Inquiry-II sections of this Opinion and Order, the Commission finds that C&P's adjusted net operating income was $161,977,000 for the 12-month period ended August 31, 1982. (See Appendix 3.)

III. Computer Inquiry II

A. Introduction.

As was noted in our Order No. 65714 in Case No. 7591, the Federal Communications Commission ("FCC") has been conducting proceedings in a case known as the *Second Computer Inquiry* ("CI-II"). The CI-II decisions made by the FCC provide that on and after January 1, 1983, the Bell System may market new customer premises equipment ("CPE") only on a detariffed basis, and only through the newly-formed, fully separated subsidiary, American Bell, Inc. Accordingly, on and after January 1, 1983, C&P may not market new CPE under the Bell System umbrella.

CI-II further provides that C&P may market and provide embedded CPE during 1983 on a tariffed basis. Under the terms of CI-II, embedded CPE is that which is in service or in C&P's inventory on December 31, 1982.

Rules established by the FCC further provide that ABI may contract for C&P's services in installing CPE for complex business systems sold or leased by ABI in 1983; C&P would be reimbursed for its direct expenses under

any such contract. Finally, it should be noted that C&P assisted in the "creation" of ABI by transferring some of its employees and Phone Center outlets to the new entity. Several parties commented on these aspects of CI-II; they will be discussed shortly.

In recognition of the impact that CI-II will have on C&P's operations, the Company and Staff propose adjustments to the historic test year in order to reflect estimates of the CI-II impact. While Mr. Louiselle also computes a CI-II adjustment, People's Counsel recommends that the Commission recognize the infirmities of any such adjustment and, as previously noted, respond to this state of uncertainty by not giving effect to wage, salary and benefit increases past December 31, 1982, as the sole means of adjusting C&P's operations for the effect of CI-II. Mr. Louiselle points to a number of factors which will impact C&P's operations and which are not quantified in the proposed adjustments. Therefore, he recommends that if any CI-II adjustment is accepted, the August 1983 wage increases nevertheless should be rejected.

A major philosophical difference in calculating the impact of CI-II divides the parties. C&P states that its adjustments are based on the premise that it is proper to restate the relationships among revenues, expenses and rate base during the test year to reflect the relationships which would have existed had CI-II been in effect during the entire test year. C&P says that these restated relationships will be representative of those that will exist during the first year of new rates and are, therefore, appropriate for use in this proceeding.

On the other hand, Staff would adjust test year income and rate base only to the extent that test year figures will change as a result of CI-II. As noted, People's Counsel prefers no CI-II adjustments and would limit the wage adjustments. But, in the alternative, People's Counsel would join with Staff's position and adjust test year income and rate base only to the extent that the test year figures will change as a result of CI-II. This central conflict between the parties is repeated in the adjustments proposed for C&P's rate base, revenues, and expenses.

B. CI-II Rate Base Adjustment.

C&P proposes to reduce rate base by $8,283,000. Of that amount, $6,237,000 relates to the estimated station equipment additions which C&P installed during the year which C&P will forego once ABI begins to supply these additions (January 1, 1983). C&P argues that the $6,237,000 should be removed from rate base since C&P will not be adding this equipment to rate base due to the implementation of CI-II. The remaining $2,046,000 relates to assets to be transferred to ABI. Both Staff and People's Counsel agree that the assets to be transferred to ABI should be deleted from rate base. People's Counsel and Staff argue that the test year rate base should not be reduced by the $6,237,000, as those station equipment additions were in fact made during the test year and are now, and will be in the future, a part of C&P's rate base.

The Commission concludes that the test year rate base should be reduced by the amount of the assets transferred by C&P to ABI on January 1, 1983. Since the assets are no longer in the rate base, it is inappropriate for the ratepayers to pay a return on those assets. This is true even though the transfer occurred outside of the test period, since the transfer is a known and certain change from the test period results which should be recognized in this proceeding.

As noted by Staff and People's Counsel, C&P's other proposed CI-II rate base adjustment differs markedly from the transfer of assets to ABI. As previously mentioned, C&P made station equipment additions during the year in the amount of $6,237,000. The Company estimates that it will not make such amount of additions during the year ending December 31, 1983 due to the fact that ABI and not C&P will be making those additions. C&P notes that had CI-II been in effect during the test year, it would not have made those additions. Accordingly, C&P believes it is

appropriate to reduce the test year rate base by the amount of those "foregone" additions.

In our opinion, the proper purpose of a CI-II adjustment is to adjust the test year operating results so as to reflect the changes in those results which have been and will be imposed by the implementation of CI-II. The fact that CI-II will result in C&P making fewer station equipment additions in the future does nothing to alter the fact that it made certain station equipment additions during the test year. This equipment remains in rate base after the implementation of CI-II, so it would be improper to remove this plant from the rate base. Accordingly, the only adjustment to rate base which we will make in response to CI-II is to remove the $2,046,000 in assets which were transferred to ABI.

C. CI-II Net Operating Income Adjustments.

Each of the three witnesses arrive at a different adjustment to revenues to account for the impact of CI-II. Mr. Sewell's Attachment R-1 (part of Company Ex. 45) shows that C&P would have foregone $12,663,000 in telephone product revenues had CI-II been in effect during the test year. The figure is composed of foregone recurring (monthly) revenues in the amount of $8,307,000, and non-recurring (installation) revenues in the amount of $4,356,000. The numbers represent revenues from certain business and residential telephone products installed by C&P during the year ending June 30, 1982, which kinds of products will be provided by ABI instead of by C&P on and after January 1, 1983.

Both Staff and People's Counsel state that C&P will not lose the test year recurring revenues, as C&P will continue to recoup most of these revenues on and after January 1, 1983. This is because ABI will not be gaining control over C&P's embedded plant on January 1, 1983, and all of the plant additions shown on Attachment R-1 are now embedded plant. Thus, these parties argue that to the extent that C&P retains the customers shown on

Attachment R-1 (and to the extent that it has inventory on hand as of December 31, 1982 to sell or lease), it will not lose the monthly recurring revenues. Accordingly, Staff and OPC do not reduce test year revenues by the $8,307,000 of recurring revenues.

While Staff accepts C&P's contention that test year non-recurring revenues should be reduced by $4,356,000, People's Counsel does not. Mr. Louiselle does not reduce test year revenues by the amounts associated with test year installations of Large and Medium Dimension products, and with Horizon systems; instead, he reduces revenues only by the installation amounts associated with test year additions in the following product lines: Comkey 416, Dataphone II, and Dataspeed. The revenues associated with the installation of these systems amount to $412,000. We believe that Mr. Henkes' adjustment is more adequately justified than Mr. Louiselle's adjustment; accordingly, we accept Mr. Henkes' number.

Various expense adjustments were also proposed by the parties. After review of these adjustments, we are persuaded to accept those proposed by Mr. Henkes where there are differences between the parties. In this regard, it is our opinion that contrary to C&P's assertions, Mr. Henkes did not double-count any expenses in his adjustments for commercial and general services. The items othewise at issue are discussed below.

Messrs. Henkes and Louiselle restrict the depreciation expense reduction to that associated with assets to be transferred to ABI. C&P shows a further reduction of $700,000, which amount is associated with station equipment connections made during the test year which C&P will not incur after December 31, 1982. Consistent with our adjustment to rate base and revenues, we accept Staff and People's Counsel's adjustment of $(133,000).

The adjustment to commercial expenses removes the test year wages and salaries of employees to be transferred to ABI. Mr. Henkes' number reflects non-management

overtime pay, an increased salary adjustment factor, and a higher intrastate allocation factor than were used by C&P. Mr. Louiselle removes labor expenses associated with the August 1983 wage increase. The adjustments are: C&P — $(10,894,000); Staff — $(11,361,086), (after our removal of the effect of the August 1983 wage increase); People's Counsel — $(10,438,000). Since Staff's calculation, as adjusted by us, appears to most accurately reflect the wages and salaries of the employees transferred to ABI, we accept Mr. Henkes' adjustment.

The adjustment to relief and pensions expense removes from test year amounts the relief and pensions expense for those employees to be transferred to ABI. Messrs. Henkes' and Louiselle's amounts reflect the wage and salary amounts which they calculated for their commercial adjustments. Mr. Henkes also uses his higher intrastate allocation factor. Staff's adjustment of $(2,716,000) is hereby accepted.

The parties also suggest that State, local and other taxes be adjusted. "Other" taxes include social security, unemployment, gross receipts, and property taxes, and reflect the wage and salary, revenues, and rate base adjustments made by each of the three witnesses. Consistent with our acceptance of Mr. Henkes' adjustments for the other items impacted by CI-II, we accept Staff's number of $(875,000), as modified by us to reflect the exclusion of the August 1983 wage increase.

The amount calculated by each party for Federal Income Taxes is a reflection of all of their other CI-II adjustments; accordingly, we accept Staff's $6,305,000 adjustment, which also reflects our adjustment.

After giving effect to the accepted adjustments for the effect of CI-II on C&P, we make the following adjustments to the test year figures: rate base — $(2,046,000); revenue — $(4,334,000); expenses — $(17,165,000); and taxes — $(5,430,000). Accordingly, we will increase net operating

income by $7,401,000 to account for the impact of CI-II. (See Appendix 4.)

As previously mentioned, C&P transferred some of its employees and other assets to ABI on January 1, 1983. MIG argues that C&P has not been adequately compensated for the non-economic assets (such as the training and work experience of transferred employees and the "goodwill" associated with the Phone Center Stores, etc.) which have been transferred from C&P to ABI. MIG was unable to quantify the value of these non-economic assets. MIG urged the Commission to act to cause the stockholders rather than ratepayers to bear the burden of the inadequate compensation for the transfer.

The record before us makes clear that it is impossible to fully identify and quantify the changes which CI-II and divestiture will have on C&P's assets and revenue requirement. Considerations such as the value to be ascribed to non-economic assets have defied quantification and have not been placed in the record in this case. In view of these unknowns, our decisions in this proceeding relating to various adjustments are cumulatively designed to prevent the ratepayers from having to bear the costs of the implementation of CI-II and AT&T's divestiture. For example, our decision rejecting C&P's proposed depreciation changes is due in part to the general concern that Maryland ratepayers should not be burdened with increased depreciation expense on plant which may not be serving those customers in the near future. Similarly, treatment of wages and salaries have been made in this case recognizing the potential unknown costs associated with CI-II and divestiture.

MIG further asserts that C&P will not be compensated for its overhead and other indirect costs which it will incur pursuant to the installation and maintenance agreement between C&P and ABI. The evidence placed before the Commission by C&P leads us to conclude that the contract

does include compensation for overhead and other indirect costs.

IV. Rate of Return

A. *Introduction.*

In Case No. 7591, which was decided on March 24, 1982, the Commission found an overall rate of return of 11.7 percent to be fair and reasonable to the Company at that time. This rate of return was based on the Bell System actual capital structure as of August 31, 1981, excluding the effect of Western Electric's equity, and a rate of return on common equity of 14.75 percent.

In this proceeding, the Company is seeking a rate of return of 13.06 percent based on Dr. Carleton's finding that C&P's cost of capital ranges from 12.92 percent to 13.20 percent. To arrive at this conclusion, Dr. Carleton used the Bell System consolidated capital structure as of August 31, 1982, (including both Western Electric equity, and C&P's Job Development Investment Credits — "JDIC") and cost rates as follows:

Type of Capital	*Capitalization Ratio*	*Cost Rates*	*Weighted Cost*	*Cost of Capital*
	%	%	%	
Debt	41.3	8.82	3.64	
Preferred	2.1	7.83	0.16	
Common Equity	50.5[37]	16.50-17.00	8.33-8.59	
JDIC	6.1	12.92-13.20	0.79-0.81	
Total	100.00			12.92-13.20

[37] Dr. Carleton also provided an exhibit showing his capital structure if the effect of Western Electric equity is removed. It shows the following components: Debt — 43.5 percent; Preferred — 1.9 percent; Common Equity — 48.4 percent; and JDIC — 6.2 percent. If one were to conform Dr. Carleton's capital structure with our decision in Case No. 7591 (wherein we removed JDIC and the effect of Western Electric equity from the capital structure), the following capital structure would result: Debt — 46.4 percent; Preferred — 2.0 percent; and Common Equity — 51.6 percent.

The rate of return recommendations on behalf of the Maryland Industrial Group were presented by Dr. John J. Boland. Dr. Boland bases his analysis on the actual consolidated capital structure as of August 31, 1982, adjusted for the impact of Western Electric equity as follows:

Type of Capital	*Capitalization Ratio*	*Cost Rates*	*Weighted Cost*	*Cost of Capital*
	%	%	%	
Debt	46.4	9.22	4.278	
Preferred	2.0	7.80	0.156	
Common Equity	51.6	14.76-15.89	7.616-8.199	
Total	100.00			12.050-12.633

In addition to the testimony of Dr. Boland, MIG also offered Lee Selwyn, who testified generally on the impact on rate of return of the forthcoming divestiture. It is Dr. Selwyn's recommendation that to the extent that the Commission finds that C&P's transfer of assets at book value constitutes a dividend to AT&T's shareholders, no further increase in the current return on equity of 14.75 percent should be permitted, until the magnitude and effect of such a dividend is quantified. MIG urges the Commission to incorporate Dr. Selwyn's recommendations in reaching a decision on what constitutes a fair rate of return in this case.

People's Counsel recommends an overall rate of return of not more than 11.61 percent. This overall rate of return is supported by People's Counsel Witness Richard J. Lurito. Dr. Lurito recommends the use of a hypothetical capital structure to determine C&P's cost of capital, as follows:

Type of Capital	*Capitalization Ratio*	*Cost Rates*	*Weighted Cost*	*Cost of Capital*
	%	%	%	
Debt	52.0	9.11	4.74	
Preferred Stock	3.0	7.84	0.23	
Common Equity	45.0	14.75	6.64	
Total	100.00			11.61

On brief, People's Counsel urges, in case the Commission again rejects Dr. Lurito's capital structure, to use a capital structure with no higher equity ratio than the capital structure which was adopted for rate making in the last case. People's Counsel points out that if the Commission adopts that capital structure in this proceeding, along with the Bell System's actual cost of debt and preferred and the 14.75 percent cost of equity, the overall cost of capital would just be one basis point higher than the overall rate of return recommended by Dr. Lurito based on his hypothetical capital structure.

Mr. Langsam, testifying for GSA, joins Dr. Lurito in calling for use of a hypothetical capital structure. The capital structure proposed by Mr. Langsam includes 50 percent debt and 50 percent common equity. Based upon a return on common equity recommendation of 13.5-14.5 percent for common equity, GSA recommends an overall cost of capital of 11.3 percent.

In determining the appropriate rate of return, consideration must be given to a number of financial factors, including the ability of a utility to raise capital necessary to discharge its statutory obligation to provide reliable and adequate service to the public, a level of earnings sufficient to assure confidence in the financial integrity of the company, and maintain its credit standing. These standards are stated in two landmark United States Supreme Court cases, *Bluefield Water Works and Improvement Co. v. West Virginia Public Service Commission,* 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Company,* 320 U.S. 591 (1944). Since these controlling legal principles have been discussed at length in prior Commission decisions, they need not be repeated in detail here.

B. Capital Structure.

As a first step, it is necessary to determine an appropriate capital structure for the Company. Once the ratios of the capital structure components (debt, preferred

and common stock) have been ascertained, cost rates can be applied to determine the prospective cost of capital. Since the cost of these components vary, their relative proportions in the capital structure will affect the Company's total cost of capital.

As indicated above, the rate of return recommended by the several cost of capital experts as fair and reasonable in this proceeding vary, in part, because of their differing opinions about the appropriate capital structure to be employed by the Commission. The capital ratios implicit in the recommendations of the parties, excluding Western Electric equity and JDIC, are as follows:

Capital Type	*C&P*	*MIG*	*OPC*	*G.S.A.*
	%	%	%	%
Debt	46.4	46.4	52.0	50.0
Preferred	2.0	2.0	3.0	—
Equity	51.6	51.6	45.0	50.0

In support of his actual capital structure, Dr. Carleton testified that increasing risks during the past 10 years have forced the Bell system to increase its equity ratio to 54 percent. Were the Commission to use a hypothetical capital structure during the divestiture juncture, it was the witness' opinion that the Company's future would be impaired. Also, on brief, the Company argues that the selection of a capital structure, absent an abuse of discretion, is the prerogative of corporate management. Dr. Boland, testifying for MIG, also uses C&P's actual capital structure but with JDIC and the impact of Western Electric equity removed.

Dr. Lurito agrees that it is entirely appropriate to rely upon an actual capital structure where such use produces reasonable, prudent regulatory results. However, where it can be shown that the actual Bell System capital structure is unreasonable or unsafe, the Commission has the responsibility of imputing a reasonable or desirable capital structure.

According to Dr. Lurito, an appropriate capital structure must present a balance between safety and economic considerations. First, the debt component should not reach such a level that the regulated company cannot cover interest charges during a period of depressed earnings. Therefore, corporate management must exercise particular care in developing its financing strategies so that an increase in the debt ratio does not produce a resultant increase in the cost of both debt and equity, a direction that is uneconomical and not in the interest of the stockholders or ratepayers.

In establishing an appropriate rate of return, the People's Counsel witness suggests that the Commission should consider and recognize the advantage obtained from the inclusion of a higher debt component in the capital structure. Not only is debt less costly to obtain, but the interest charges are deductible for income tax purposes and act to reduce Federal income taxes. In addition, a capital structure containing lower cost capital will produce an overall rate of return more favorable to the customers of a utility company.

In support of his proposition that a capital structure containing 45 percent equity is reasonable and safe for investors and economical for ratepayers, Dr. Lurito presented depression analyses and variability tests. These tests suggest that the before-tax coverage of a typical AT&T subsidiary would be 2.37 even if the parent company should experience a severe depression. Similarly, his variability tests indicate that the Company's after-tax coverage would be 3.23, even if a drop in earnings with only a 1 in 160 chance occurred.

The testimony of Mr. Langsam indicates that the AT&T capital structure should be adjusted for regulatory purposes. The witness asserts that the 53 percent equity ratio contained in the Company's capital structure is more than what is necessary to protect the financial integrity of the Company. In his opinion, an increase in the amount of

equity can be a management tool to provide unnecessary margins of safety or to finance a corporate purpose not necessarily associated with the actual supply of a tariffed service or equipment, by charging higher than necessary prices for regulated services. Finally, the witness testified that during the seventies, when the Bell System had a common equity ratio of 45 percent, AT&T maintained its triple A rating and was able to raise both equity and debt capital at reasonable rates. For these reasons GSA recommends that the Commission adopt a hypothetical capital which contains components of 50 percent debt and 50 percent common equity.

It has been the Commission's policy to adopt a company's actual capital structure at or near the date when the revised rates become effective, unless the actual capital structure is found to be unreasonable. The advantage of using an actual capital structure is that it represents a known structure and provides objective data for the determination of the overall cost of capital. To the extent that an actual capital structure close to the date of authorization of new rates is found to be reasonable and appropriate, it will be reflective of the actual cost of capital to the Company existing during the period the revised rates will be in effect.

However, as we indicated in previous C&P cases, we would not hesitate to adopt a hypothetical capital structure if it were proven that the actual capital structure were unreasonable.[38] Since common equity requires a higher return than do preferred stock or debt, a rate of return developed on an unnecessarily high equity ratio would generally result in a higher overall rate of return and higher rates. However, in determining what

[38] In *Re The Chesapeake and Potomac Telephone Company of Maryland*, Case No. 7591, *supra*, at 53; *Re The Chesapeake and Potomac Telephone Company of Maryland*, Case. No. 7467, Order No. 65112 (January 29, 1981), at 50; *Re The Chesapeake and Potomac Telephone Company of Maryland*, Case Nos. 7335/7305, Order No. 64111 (November 13, 1979) at 31.

overall rate is reasonable, under any particular circumstances, it also must be acknowledged that the actual capital structure has a definite effect on the cost of capital which a company incurs when it seeks additional financing. In determining the reasonableness of a particular capital structure, many factors enter into consideration. It has been argued that a slightly higher equity ratio is one factor which results in an improved bond rating, and, therefore, a lower cost of debt. A higher equity ratio also may provide financial flexibility at times when it would be uneconomic or not feasible to issue additional equity.

In C&P's recent base rate proceedings the Company and its rate of return experts recommended that the Commission adopt for the purpose of determining the overall rate of return not the actual consolidated capital structures as of the date of decision, but the Bell System's objective of achieving a capital structure with an equity ratio of 55 percent (the "objective capital structure"). Based upon the considerations of the principles of safety and economy in the capital structure and upon the evidence presented in those proceedings, the Commission rejected the objective capital structure sought by C&P. In this proceeding, the Company seeks a rate of return determination based on the actual consolidated capital structure, which now has approached AT&T's objective, containing 54 percent of equity, prior to adjustment for Western Electric's equity.

It is clear that since Case No. 7591, the corporate management of AT&T has continued to pursue a financial strategy to achieve a 55 percent objective common equity ratio for the Bell System. The issue before this Commission is whether the Company's level of equity financing contained in its capital structure is so high as to impose an unreasonable burden on ratepayers.

The Commission is in agreement with the general proposition that the selection of an appropriate capital structure is a judgment that properly rests with corporate management. However, the exercise of this judgment is

not without limits. For example, in Case No. 7591 the Commission found the actual capital structure as of the end of the test year in that recent proceeding to be reasonable, but rejected the use of the objective capital structure. The capital structure adopted in that case was comprised of 47.93 percent Debt, 2.44 percent Preferred Stock, and 49.63 percent common equity, with the effect of Western Electric equity and JDIC removed. In this proceeding, the Company is seeking to increase its equity ratio an additional 197 basis points (removing Western Electric equity and JDIC) above that found appropriate less than 11 months ago.

The Company, in this proceeding argues that increasing risks during the past 10 years have forced the Bell System to increase its equity ratio to 54 percent. As an additional reason for retaining the actual consolidated capital structure, the Company indicates a change at this critical juncture to a hypothetical capital structure would be contrary to the direction which investors expect the Company to move and would impair the Company's credit in the future.

However, it seems equally clear that the increase in the Bell System's equity ratio may also be the result of higher risks related to divestiture and the entrance by AT&T into the competitive, nonregulated sector of the economy. Additionally, the Company has not sufficiently demonstrated that the capital structure it seeks will protect the financial integrity of the corporation as well as provide the most economical rates to its customers. Furthermore, the record does not contain persuasive evidence to conclude that the adoption of a capital structure below the 53.8 percent requested by the Company would be unsafe for investors and uneconomical to ratepayers.

For the above reasons, in this proceeding we will not adopt C&P's actual capital structure to determine the Company's revenue requirement. We turn, therefore, to a hypothetical capital structure. Although the Commission

recognizes that it may be appropriate for the Company to consider more debt rather than equity as a source of future capital, we are not convinced that it would be appropriate, at this time, to impute an equity ratio below the 49.63 percent authorized in the Company's previous rate proceeding.

For the purpose of this proceeding, we will adopt all of the components of the capital structure in the same ratio as that employed by the Commission in Case No. 7591. Thus the following is the capital structure which we shall use for C&P of Maryland: Debt — 47.93 percent; Preferred Stock — 2.44 percent; and Common Equity — 49.63 percent.

We believe that this capital structure is reasonable and appropriate and, along with the associated cost rates, will yield a fair return and just and reasonable rates.

C. Cost of Common Equity Capital.

In estimating the cost of equity to C&P of Maryland, all four expert witnesses have attempted to measure the cost of equity to the parent company, AT&T.

Dr. Carleton presents four different applications of the Discounted Cash Flow ("DCF") method: (1) a standard DCF model, with earnings per share ("EPS") growth rates; (2) a standard DCF model, with dividends per share ("DPS") growth rates; (3) a standard DCF model with growth expressed as average recent retention rate times recent AT&T return on equity ("ROE"); and (4) a finite horizon DCF model. Dr. Carleton, like Messrs. Boland and Langsam, makes no allowance for financing costs or market pressure in computing his estimated cost of equity.

For use in his standard DCF model, Dr. Carleton estimates AT&T's stock price to be $58.00 to $62.00 (the final of three updated estimates). Two previous estimates proffered by Dr. Carleton during the course of these proceedings underestimated the appropriate market price,

as AT&T's market price rose significantly over the course of this proceeding. Each time the stock price rate in a DCF calculation increases, the cost of equity recommendation generally declines.

In each of the first three DCF methodologies employed by Dr. Carleton, the current AT&T dividend of $5.40 was used. The growth projections were based upon data for the period from 1970 to 1981.

Under the DCF procedures used by Dr. Carleton, the estimated adjusted dividend yield is 9.30 to 9.94 percent. He estimates growth rates of 6.80 to 8.13 percent, and a retention ratio of approximately 39 percent. Finally, Dr. Carleton tests his DCF estimates by analyzing "comparable" high-grade electrics. The bare costs of equity for his comparable utilities are in the 15.9 to 16.64 percent range.

Dr. Carleton concludes from the operation of his four DCF analyses, with his comparable earnings study as a check, that the appropriate return on common equity in this proceeding is between 16.5 percent and 17 percent.

Dr. Lurito also uses the DCF method to estimate AT&T's cost of common equity. According to this witness, the DCF method views the appropriate cost of equity as that which equals the dividend yield plus the expected growth in dividends per share.

In developing his estimated cost of equity, Dr. Lurito determined "reasonable" expected growth rates and dividend yields for AT&T, two "similar" Bell companies (Cincinnati Bell and Southern New England Telephone), and a group of 15 high grade "comparable" electrics. For these companies, Dr. Lurito analyzed historic growth rates in dividends per share, book value per share, and the growth from retained earnings. According to Dr. Lurito, the growth in dividends depends, in the long run, on the growth in earnings per share. By computing growth in book value per share, he derives the growth in earnings per share adjusted to remove any trend. In addition, Dr.

Lurito assesses the impact of current and near-term economic and financial conditions on investor growth expectations.

For purposes of his DCF analyses, Dr. Lurito uses a growth rate of 5.50 percent. This is based upon the witness' assertion that investors expect AT&T to earn 14 to 15 percent on interstate operations and 13.5 to 14 percent on intrastate operations. With a 30/70 ratio of interstate/intrastate operations applicable to C&P of Maryland, Dr. Lurito suggests that investors' return on equity expectations are approximately 14.25 to 14.75 percent. Such a rate of earnings expectation, coupled with AT&T's historical and current retention rate of 39 percent, would produce a growth rate in the 5.5 to 5.75 percent range. For purposes of analysis, Dr. Lurito uses 5.5 percent.

Use of 14.75 percent return on equity, Dr. Lurito suggests, would allow a 1.05 percent market-to-book ratio to be achieved, and would avoid a dilution of current stock. In his opinion no allowance should be given to cover future costs of pressure and potential market declines because the equity ratio is already inordinately high. According to Dr. Lurito there will be no need to sell additional common stock in the near future in order to attain a reasonable capital structure.

Finally, Dr. Lurito notes that 6 percent of AT&T's total investor-supplied capital is comprised of unamortized investment tax credits. In view of this 6 percent JDIC, Dr. Lurito states that his recommended 14.75 percent return on equity would actually enable C&P to earn about 16.3 percent on its equity investment. People's Counsel urges the Commission to consider this factor in determining the appropriate return on equity.

Dr. Boland also forecasts a cost of equity capital through the use of a DCF analysis. Dr. Boland derives his 5.5 to 6.5 percent expected growth rate from an examination of historical and current dividends and earnings per share. He uses the mid-range of AT&T stock prices during a

recent period as an "appropriate measure" of the value of AT&T stock. The mid-range price in Dr. Boland's analysis is $61 per share. Using his growth rates and dividend yields, Dr. Boland estimates the return on equity to be 14.76 to 15.89 percent.

Mr. Langsam testifies that he conducted both DCF and comparable earnings analyses to arrive at what he considers to be the appropriate return on equity. Mr. Langsam's comparable earnings study analyzes the relative risks and the associated returns for AT&T, and selected Industrials and Utilities from *Moody's* and *Standard & Poor's*. In his view, these widely recognized financial series are representative of the investment alternatives available to AT&T's current and prospective investors. The results of his study indicate to Mr. Langsam that an investment in AT&T entails the least risk out of all the alternatives studied. Again, as in the last two C&P cases, Mr. Langsam states that a 12.5 to 13.5 percent return on equity for AT&T is comparable to the current earnings of the industrials.

Using the market value ("DCF") approach, Mr. Langsam states that the cost of equity capital is the sum of the investors' dividend yield and their expectations of investment growth. Mr. Langsam points out that expectations about the Bell System's earnings and dividends must be evaluated in light of the divestiture which would cluster network access and local switching services under the jurisdiction of this Commission, while freeing all other services up to market control. With that caveat, Mr. Langsam used the market value approach to estimate AT&T's cost of equity. Incorporating a dividend yield of 8.5 to 10.0 percent and growth expectations of between 3.0 and 4.5 percent, he opined that AT&T's indicated cost of equity is in a range of 13.5 to 14.5 percent.

Mr. Langsam did not add any amount to his estimated cost of equity for market pressure or for the cost of financing. In his view, market pressure is already

reflected in AT&T's investors' dividend yields and growth expectations. With respect to financing costs, Mr. Langsam stated that his recommended cost of equity would be sufficient to prevent dilution of existing shareholders' equity when additional equity is sold. By his two (DCF and comparable earnings) studies, Mr. Langsam concludes that the appropriate return on equity capital is 13.5 to 14.5 percent.

The Commission has carefully reviewed the testimony and evidence presented by the parties regarding the cost of equity. We have considered the various criticisms of the presentation which were offered by the parties. We recognize that each of the methodologies employed by the witnesses in determining their recommended costs of equity herein requires various assumptions and judgments. We have considered the concerns of Dr. Selwyn that C&P may not be fully compensated by AT&T for C&P's role in the creation of ABI and for the transfer of assets which will occur as a result of divestiture. Also, we have given recognition to the depressed condition of the State's economy and the high unemployment rate among Maryland's labor force. In light of our evaluation of the evidence herein, we find the cost of equity to AT&T at this time to be 14.75 percent.

This is the same cost of equity which we authorized 11 months ago in Case No. 7591 and is the cost which has been recommended in this case by the witness of People's Counsel. The record before us leads us to conclude that the capital structure and cost of equity authorized 11 months ago continue to be just and reasonable and that the Company's proposed changes thereto are not justified.

Parenthetically, we note in making this determination that 6 percent of C&P's rate base is financed by Job Development Investment Tax Credits, and that the Company will be allowed to earn the overall rate of return on plant associated with those credits. We have not, however, revised the return finding downwards in recognition of this fact.

D. Cost of Debt, Preferred and Overall Rate of Return.

There is disagreement as to the appropriate cost of debt to use in this case. The witnesses for C&P and MIG recommend a cost rate for debt which is different than the cost of debt projected by Dr. Lurito for People's Counsel. Dr. Lurito puts forth a cost rate for debt which is based upon a hypothetical debt ratio significantly higher than the ratio which we have found is appropriate for rate-making purposes in this case. Dr. Lurito concedes that his proposed 9.11 percent cost of debt is inappropriate to the capital structure of the type which we have adopted. In his alternative proposal, Dr. Lurito arrived at his recommended cost rate of debt using the actual embedded long term cost rate as of December 31, 1982 of 8.74 percent and a short term debt rate estimated at 7.75 percent. The total debt rate as of December 31, 1982 of 8.63 percent is adjusted to 9.11 percent to compensate for the increased risk of the hypothetical 52 percent debt ratio utilized by Dr. Lurito.

After careful review of the testimony of evidence concerning the cost of debt, we are persuaded that the 8.82 percent actual cost rate cited by Dr. Carleton is appropriate for rate-making purposes. Accordingly, we believe that a fair rate of return is most likely to be achieved by using the following capital structure with the corresponding cost rates:

	Ratio	*Cost Rate*	*Weighted Cost*
	%	%	%
Debt	47.93	8.82	4.23
Preferred	2.44	7.84	0.19
Common Equity	49.63	14.75	7.32
Total	100.00		11.74

Combining the return on equity of 14.75 percent with the appropriate 7.84 percent cost of preferred stock and the 8.82 percent cost of debt, and using the capital structure previously found to be appropriate, results in an overall fair and reasonable rate of return of 11.74 percent.

V. Revenue Requirement

Application of the 11.74 percent rate of return to the fair value rate base of $1,505,988,000, results in a return requirement of $176,803,000. When the adjusted test year net operating income of $161,977,000 is subtracted from this amount, the result is a net operating income deficiency of $14,826,000, which in terms of additional gross annual revenue becomes $28,200,534. Accordingly, we find that the proposed rates filed by the Company are not just and reasonable and that just and reasonable rates are those authorized herein.

VI. Rate Design

A. *Introduction.*

In order to obtain the additional revenue requested in this case, C&P has proposed a general across-the-board increase in rates for most services, including basic local exchange service, and selective adjustments to or restructuring of a number of rates and charges. The Company proposes to restructure service connection charges, long distance rates, local operator assistance charges, and PBX trunk rates; to establish an unrecovered equipment charge; to increase the coin telephone rate and the message unit rate; and to reclassify some local exchanges.

The Company characterizes its rate proposals as an across-the-board approach which generally adheres to existing pricing principles and avoids extensive rate design restructuring. Other parties maintain that the Company has violated its own across-the-board approach by its selective proposals for lesser or greater rate increases and substantial restructuring of certain rates and charges. They emphasize that the Company has provided no cost justification for these selective rate changes.

C&P believes that its rate structure proposals are fair and equitable to its customers and are in accordance with

the previously approved rate structure allowed by this Commission. In contrast, People's Counsel believes that the Company's across-the-board increases and selective rate restructurings are unreasonable, without credible justification, and inequitably allocate the revenue requirement.

B. *Cost Allocation Studies.*

It is this Commission's statutory duty to determine whether C&P's proposed rates are just and reasonable. In essence, reasonable rates are those which fairly compensate the Company for the costs of providing service and which insure that all ratepayers are treated fairly and equitably by preventing undue preference and unreasonable discrimination. Substantial disparities in the rate of return among categories of service, or classes of customers, will indicate that a rate structure is unduly preferential or unreasonably prejudicial.

People's Counsel sponsors the testimony of Dr. Wilson to demonstrate that the company's current rate structure does not equitably allocate the revenue requirement among categories of service. On brief, People's Counsel argues that C&P's proposed rate changes would not remedy, and could exacerbate, the inequitable allocation. The Company sponsors the testimony of Mr. Anderson to illustrate the reasonableness and equity of its current rate structure.

Before addressing the merits of the cost-of-service studies discussed by Dr. Wilson and Mr. Anderson, it is appropriate to briefly review the procedural history of the Commission's consideration of cost allocation methodologies. In Case No. 7591, People's Counsel presented Dr. Wilson's fully distributed cost (FDC) study and C&P presented Mr. Anderson's embedded direct analysis (EDA). The Commission decided that the particulars of Dr. Wilson's cost allocation method needed to be further developed in a second phase of the proceeding. In July 1982, the Commission commenced Phase II of Case No.

7591 to seek further information to determine whether Mr. Anderson's embedded direct analysis or Dr. Wilson's fully distributed cost study would provide the most useful information about the relative costs and revenues of each category of service. During the fall of 1982, testimony was taken in Phase II.

In the meantime, C&P filed its rate application in the instant case, Case No. 7661. The embedded direct analysis and the fully distributed cost study were again before the Commission in the context of this rate filing. At the conclusion of the hearing in Case No. 7591, Phase II, the Commission directed that the issue of cost studies, as well as the pertinent parts of the record from Case Nos. 7435, 7591, Phase I and 7591, Phase II, be consolidated for briefing in this proceeding. Thus, in considering the matter of cost allocation methodologies, the Commission has considered the record in this case and the pertinent parts of the record in the aforementioned cases.

Both Mr. Anderson's and Dr. Wilson's studies are intended to demonstrate the cost and revenue effects of broad categories of telephone service. Both studies used cost and revenue data from calendar year 1980. All parties agree that such studies cannot be used to derive rates for individual service offerings. Rather, cost-of-service studies are useful to determine the revenue requirement for each of several broad service categories. A properly conceived and executed study can provide information and guidance to enable the Commission to eliminate cross-subsidization among broad service categories.

Dr. Wilson testified that deficiencies in the Company's embedded direct analysis produce significant distortions in the allocation of costs and revenues and that a fully distributed cost study provides a much more accurate assignment of costs and revenues to each of the individual service categories. In performing his fully distributed cost-of-service study, Dr. Wilson allocates common and joint costs to service categories according to cost-causative

factors such as the use of facilities, availability of facilities, and the design and performance characteristics of facilities.

Dr. Wilson believes that his study cures a major defect in the Company's embedded direct analysis. He believes that EDA's designation of a large amount of costs as "common" or "access" costs, and the assignment of these costs to the local exchange service category has produced significant allocation distortions. Further, he states that the Company's methodology has overassigned costs and underassigned revenues, to the local exchange service category. Dr. Wilson believes that the fully distributed cost study shows that local exchange rates bear a disproportionate burden in producing the Company's revenue requirement.

In contrast, the Company asserts that Dr. Wilson's fully distributed cost study is arbitrary because certain costs are inseparable and cannot be assigned to categories of services on a cost-causative basis. It is an arbitrary exercise of judgment to assign inherently inseparable and non-causally related costs to categories of service. Also, the Company, the Maryland Industrial Group and the General Services Administration aver that Dr. Wilson made substantial errors in applying his fully distributed methodology. They believe that Dr. Wilson's study arbitrarily and erroneously allocates to other service categories certain costs which should be allocated to basic service, and assigns to basic service certain revenues which should be assigned to other categories of service.

For reasons discussed below, the Commission concludes that the deficiencies in Dr. Wilson's fully distributed cost study are such that the study cannot be used as a basis for rate decisions in this case. Shortcomings in the study also prevent the Commission from adopting the study's conclusion that local exchange service contributes more than its fair share to the Company's revenue requirement.

It is clear from Dr. Wilson's testimony that a variety of cost-causative factors can be employed to fully distribute joint costs and common costs to categories of service, and that a high degree of judgment must be exercised in determining which factors shall be used. For example, Dr. Wilson presented four different fully distributed cost studies. In each study, different cost-causative factors were used to allocate various costs and revenues, and therefore each study had different results. Among the four studies, the return earned for the local exchange category ranged from 6.86 percent to 27.25 percent. The results were widely disparate because the cost-causative relationship of various service categories to the joint or common cost is often highly judgmental.

One of the most significant judgmental decisions made by Dr. Wilson relates to his apportionment of access line costs among the basic exchange, interstate toll, intrastate toll, customer premises equipment and vertical services categories. The Commission believes that Dr. Wilson's apportionment relies far too heavily upon the availability factor. More importantly, his methodology was developed prior to, and therefore does not take into consideration, the FCC's recent decision pertaining to the system of interstate access charges which will be phased-in after AT&T's divestiture in 1984. To be useful to the Commission, a fully distributed cost study must consider, in the methodology for distributing the cost for access lines, the FCC's system of access charges.

The Commission believes that Dr. Wilson erroneously assigned directory advertising revenues to the exchange service while distributing the directory costs to local exchange, interstate toll and intrastate toll categories. We note that Dr. Wilson has assigned the vast majority of station maintenance expense to the customer premises equipment category. This appears to be in contradiction to previous testimony that these expenses should be distributed in proportion to investment in exchange service and customer premises equipment. The future relevance of

Dr. Wilson's station maintenance expense allocation is further reduced by the effect of Computer II and AT&T's divestiture upon the customer premises equipment category and by the FCC's move toward deregulation of inside wiring.

Although the Commission believes that Dr. Wilson's fully distributed cost study should not be used in rate decisions in this case, the Commission does believe that there is merit to the objectives of the fully distributed cost methodology. In future cases the Commission would like to be able to more thoroughly analyze the potential for assigning various joint costs and common costs to categories of service. Contrary to the position of the Company, the Commission does not believe that the allocation of joint or common costs must always be an exercise of arbitrary discretion. Rather, in instances it may be possible to exercise reasoned judgment if more complete and accurate data were available. Were such data available, various joint or common costs may be appropriately assigned to service categories based upon cost-causative factors such as peak demand, service availability, service over distance, service over time, service connections or facility design considerations.

In the current telecommunications environment, cost-based rates will be more essential than ever before. Value-of-service pricing may have been appropriate in the past under essentially monopoly conditions. However, under the new competitive conditions brought about by Computer II and the divestiture of AT&T, cost-of-service studies will become more important in order to avoid cross-subsidization in service categories. Appropriate cost allocation methodologies must be adopted in order to assure that each service category contributes its fair share to the Company's revenue.

Therefore, the Commission believes that C&P must expand and improve its data base for performing cost-of-service studies. Data on peak usage of facilities by service

and customer class should be collected. Also, data pertaining to capacity needs for various types of service should be assembled. Finally, revenue data by tariff item should be reported. Therefore, the Commission directs the Company to collect and have available such data in the future.

The FCC's Computer II decision and the court-approved divestiture of AT&T will greatly impact upon cost of service and revenues of C&P. The deregulation and restructuring of the telecommunications industry will require the Commission to reexamine the Company's existing rate structure. It is for this reason that during December 1982, the Commission granted the motion of the Company, the Staff, and People's Counsel to expand the scope of Case No. 7450 to consider which exchange classification principles and rate structure principles may be appropriate for C&P's regulated intrastate services after divestiture of AT&T. The Commission expanded the proceedings to include consideration of the intra-LATA exchange structure, and the rate structures for access charges, basic business and residential service, service connection charges and other vertical services remaining with C&P after divestiture. Thus, many cost allocation issues will have to be considered in that proceeding.

In Case No. 7450, Phase II, the Commission expects the Company to present alternatives for allocating, to the greatest degree possible based upon cost-causation principles, joint and common costs to appropriate categories of service. Each major source of joint costs and common costs should be examined to determine whether such source can be apportioned reasonably and equitably among service categories by one, or a combination of any of the following cost-causative factors: peak demand, service availability, service over distance, service over time, service connections, and facilities design considerations. The Company should discuss why it believes that the major sources of joint costs and common costs are, or are not, reasonably and equitably allocable to categories of service. Even if the

Company doubts that a major source of joint or common costs can be assigned reasonably or equitably to specific categories of service, the Company should indicate which cost-causative factor(s) would be the most useful and reliable in allocating such joint cost or common cost among the categories of service.

In Case No. 7450, Phase II, the Commission will explore whether joint and common costs should be allocated to various service categories based upon cost-causative factors listed above rather than being assigned totally to the local exchange service category. It is expected that the Company will fully discuss cost-causative factors for assigning access line investments and central office switching equipment to specific service categories. Of course, such options must fully consider the FCC's plan to phase-in access charges for long distance calls.

Thus, in Case No. 7450, Phase II, all parties and the Commission will have an opportunity to concretely examine the usefulness of various cost allocation methodologies for establishing future rate structure principles to be employed after divestiture by AT&T. The Company, People's Counsel, the Commission's Staff and other parties should take that opportunity to improve, update and refine their proposals for cost allocation methodologies and to assure that those methodologies fully and realistically consider the effects of Computer II and AT&T's divestiture. The Commission is intent upon assuring that future rate structure principles, which will be employed after divestiture by AT&T, will be based upon the most accurate cost-of-service allocation methodology.

C. Across-the-Board Increase.

It should be emphasized at the outset that the rates which we authorize in this proceeding will likely be subject to revision after the divestiture of C&P from the Bell System. Divestiture may occur as soon as January 1, 1984. It is evident that substantial changes will occur in C&P's product and service offerings once divestiture

occurs; in fact, many of the products and services which C&P now offers will no longer be provided by C&P after divestiture. Accordingly, major restructuring of C&P's rates and charges will be necessary in the very near future. In addition, it should be noted that the Commission has initiated Case No. 7450 as a forum for consideration of major rate design proposals.

In recognition of these facts, the Commission has decided to defer most proposed rate design changes to Case No. 7450, including but not limited to the proposals of TAS and The Alarm Companies. Except for the following items, all products and services will be increased on an across-the-board basis; in addition, except for the following items, no new rates or charges shall be established, nor shall any current charges be restructured. This decision does not mean that we reject in principle the rate design proposals advocated by the parties in this proceeding; rather, the parties' proposals and those changes dictated by the break-up of the Bell System will be considered together in the generic proceeding.

D. Restoration of Service Charges.

For customers who have had their telephone service disconnected, C&P is proposing to increase the current charges from $11.50 and $13.50 to $15.00 and $18.00, for residential and business service, respectively.

Having considered the record on this matter, the Commission finds that these charges should be increased to $13.00 for residential customers and to $16.00 for business customers.

E. Bad Check Charges.

In Case No. 7591, we authorized C&P to institute the present $6.00 processing fee for dishonored checks. In consideration of the record in this proceeding, we find that an increase to $7.00 is appropriate.

F. Unrecovered Equipment Charges.

This is a new nonrecurring charge proposed by the Company. Customers will be billed for each Company-owned telephone set not returned to C&P when service is terminated. The charge varies according to the replacement cost of the eligible set minus the refurbishing cost. Mr. Ismail, a Staff witness, concluded that the Company's proposal was justified and should be permitted. The Commission has given thorough consideration to this item and concludes that the Company proposal should be accepted.

G. Coin Rates.

The Company proposes to increase the charge for a local coin telephone call from $.15 to $.25. According to the views expressed by the Company, local coin is a discretionary service, comparable to the Company's vertical services and can serve as a revenue source to help keep the rates for basic service as low as possible. Mr. Kemp testified that Company studies show that the majority use of local telephone service is by people in transit, away from their home or place of business, not by low income customers as a substitute for basic service.

The Company notes that an increase in the coin rate would be consistent with rates for local coin calls charged in other states. There are currently 30 jurisdictions in the country which have rates for local coin calls of $.20 or $.25.

The Company also points out that this Commission has not authorized an increase in the coin rate since 1977, whereas increases in rates for basic exchange and other services have been authorized.

Finally, the Company addresses the concern expressed in the Commission's final Order in Case No. 7591 with regard to the coin telephone as serving emergency use. As all outdoor telephones are now equipped with dial tone

first, no coin is required to contact the operator or 911 in an emergency or to make a non-emergency call with operator assistance. In an emergency situation a coin telephone would, therefore, be available, regardless of the charge for local coin service.

People's Counsel recommends that the price of local coin calls not be increased. This recommendation is consistent with People's Counsel's recommendation not to increase any of the services included in the local exchange category, based on the class cost-of-service study presented by Dr. Wilson which concluded that the local exchange category is currently compensatory. Also, People's Counsel suggests the initiation of a reduced coin rate at designated locations to insure that low-income individuals who might depend upon the coin telephone for basic service will not be displaced.

Staff Witness Ismail proposes implementing time measured service of coin calls, retaining the $.15 charge for the initial five minutes of a local coin call, and charging $.05 for each additional three minutes. Staff's recommendation is influenced by a concern that a substantial increase in the cost of basic service, as proposed by the Company, may cause many customers to give up basic service and rely on public coin telephone.

We share Staff's and People's Counsel's concern for the continuing affordability of basic telephone service. In this regard we conclude, however, that assuring universal telephone service is best served by keeping affordable rates for basic exchange service. We do not believe that keeping local coin rates below their fair share of rate increases at the expense of the basic exchange service would best serve the Maryland subscribers and promote the goal of continuing affordability of telephone service.

We note that, in order to continue the affordability of basic exchange service, the rate increase authorized herein is only a fraction of that originally proposed by the Company. The across-the-board increase is not of the

magnitude which was anticipated by the witnesses and which caused their concern that many customers might have to rely upon the coin phone in lieu of basic residential service.

As we stated above, in the current telecommunications environment, cost based rates will be more essential than ever before. Value of service pricing may have been appropriate in the past; however, under the new competitive conditions, it will be increasingly important to avoid any cross subsidization of any service categories. For that reason we reject the Company's contention that local coin service, like vertical services, should serve as a revenue source to help keep the rate for basic service as low as possible.

In Case No. 7591, we rejected the Company's request for an increase in coin rates which was primarily supported by the argument that local coin telephone service could be increased because it is primarily used by people in transit. Likewise, in this case, we will not base our decision on that argument. Rather, consistent with our goal of promoting cost-based rates, we reach the decision that the local coin telephone service should bear its fair share of rate increases.

The last increase in the coin telephone rate was granted in 1977, where the Commission concluded that in order to provide the revenues necessary to recover the increased cost of coin service, the rate should be increased to $.15 a call. Since then coin rates have been maintained at $.15 while basic and other services have been increased in all succeeding rate cases.

The Company has not conducted any cost studies to support its proposal to increase the coin rate to $.25 a call. Neither does People's Counsel's cost study analyze the cost of providing coin service as a distinct and separate category. Therefore, our decision in this matter cannot be founded on any particular cost study of record. However, in view of the extent to which other basic services have

been increased over the past years while the coin rates have been held constant, it is our judgment that an increase in the coin rates is equitable and warranted at this time. We limit the increase authorized herein to a change from $.15 to $.20 a call and reject the Company's proposal for an increase to $.25.

The parties are in general agreement that if an increase in coin rates is authorized, the number of coin calls which will be made during the initial period subsequent to the increase will be reduced from the number recorded during the test year. This phenomenon is called "repression." To achieve an accurate calculation of the additional revenue which will be produced by an increase in the coin rate, repression must be quantified.

C&P determined the impact of repression from the increased rate by using an econometric model prepared by its Witness Agnich. In developing his econometric model, Mr. Agnich included the following factors as affecting demand for local coin service: The price of a local coin call, the price of other goods and services; the gross State product; and seasonality, based on data for the period 1966 to 1982. In support of Mr. Agnich's analysis, the Company presented Professor Hendrik S. Hauthakker who testified that the demand models used by Mr. Agnich are in agreement with economic theory and have been tested in accordance with the normal practices of econometrics. Professor Houthakker concluded that unless the Commission recognized the impact of repression, the Company will experience a revenue shortfall which would prevent it from earning the return authorized by the Commission.

Based on the results of Mr. Agnich's analysis, the net revenue effect of an increase of coin rates to $.20 would be an increase of $3,446,963. (In contrast, assuming no repression, there would be $6,513,536 of additional revenues).

Mr. Gallagher, on behalf of People's Counsel, and Mr. Switzer, on behalf of the Staff, presented testimony critical

of the econometric model used by Mr. Agnich. Their major criticism was based on the contention that the model used by Mr. Agnich was not suitable to quantify the impact of repression for local coin telephone service. Accordingly, both Staff and People's Counsel urge that the Company's model not be accepted as the basis for determining the net revenue effect of increasing the coin rate.

To demonstrate some of the shortcomings of the Agnich model, Mr. Gallagher showed several price elasticities and the resulting net financial effect obtained from repressions computed over various time periods. His estimates indicate that the use of time periods shorter than that utilized by Mr. Agnich would considerably reduce the financial effect on ratepayers from that suggested by the Company. For example, based on the period 1968-1982, the net financial effect is $3,446,963. Based on the period 1978-1982, the net revenue expected from increasing the coin rate to $.20 would be $5,109,218.

Mr. Gallagher further testified that, while certain price elasticity for coin service exists, other factors not taken into account in the analysis may cause coin and other revenues to increase. Simply focusing on the impact of price changes ignores the more general question of whether or not the company is likely to earn its overall rate of return during the rate effective period.

While we accept the assumption that a decrease in the number of coin calls will be experienced during the period immediately following the increase in coin rates, our consideration of all the testimony leads us to conclude that the Company's analysis overstates the repression which is likely to occur. Based on a consideration of all factors which may impact on coin call revenues and overall revenues, we will assume that a $.20 rate for coin calls will produce a net revenue increase of $5,109,200.

H. Local Operator Assistance Charges.

Consistent with the service charges proposed for operator assisted intrastate long distance calls, the Company

proposes the establishment of certain service charges to be applied to local calls for which operator assistance is required, as well as the increase of existing service charges.

The new charges which the Company proposes to institute deal with a charge for the operator's verification that a line is in working order and a charge for that same verification accompanied by an interruption of a call in the case of an emergency. Currently, such assistance is considered part of basic exchange service and there is no separate charge. The Company proposes to institute a fee of \$.30 to verify that the line is busy and one of \$.80 to verify and interrupt. Under the Company's proposal, there would be no charge if a line were determined to be out of order.

People's Counsel proposes a call allowance for verification. Noting that operator verification exists to determine the condition of an access line which is necessary to sustain service, People's Counsel recommends that at least one or several free operator verification calls per month be allowed per access line if a charge is adopted. Staff does not oppose the charges on the grounds that while not cost based, they will provide revenue to the Company and defer misuse of the services. Mr. Ismail recommends that if the Commission approves the charges, then the Company be ordered to notify all Maryland subscribers of the change by means of a billing insert.

We find that the verification and interruption charges proposed by the Company should be approved. No party objected to the proposal to charge for interruption of a call due to an emergency. With regard to the proposal to charge for verification that a line is in working order, we are unpersuaded that imposition of a charge for this service will impair service by deterring reports of trouble. On the record, it is undisputed that 88 percent of the requests of this nature do in fact result in a determination that a busy signal indicates that the line in question is

indeed busy. Under the Company's proposal should such a request result in a finding of trouble on the access line, no charge will be levied.

The Company further proposes that charges for operator-assisted local calls be instituted which are identical to the charges proposed for their long distance counterparts. Currently, a charge of \$.30 is levied for local coin calls and message rate calls made collect or billed to a credit card or third party. No charge is made for any other local call requiring operator assistance with the exception of local conference calls. For local conference calls, there is an initial period rate for the first five minutes plus an additional period rate for each additional minute for each line in addition to the originating line.

The Company now proposes to charge \$.60 for calling card calls; \$1.55 for collect calls, calls billed to a third party, and station-to-station calls dialed by an operator; and \$3.00 for person-to-person calls dialed by an operator. No charge would be made for calls to official public emergency agencies, calls made by customers who have difficulty dialing, or calls to official telephone company numbers. For local conference calls, the Company proposes to change the initial period from five minutes to one minute, to charge an additional period rate for each additional minute, and to charge a person-to-person operator service charge (\$3.00) for each line in excess of the originating line.

In light of our refusal to adopt similar operator-assistance charges for intrastate long distance calls, it would be inconsistent to adopt them for local calls. We recognize, however, that these calls have a cost approximating the cost of making similar calls long distance. For this reason, we will keep (or institute, where applicable) a single rate for all operator-assisted local calls discussed above except conference calls; we will set the single rate of \$.60. Consistent with our decision regarding long distance conference calls, we will increase the ratio for local conference service on an across-the-board basis.

I. Services Which Will Not Be Increased.

C&P proposes not increasing rates for the following services: items tariffed after August 1981; variable term payment plan options other than the month-to-month payment option, and two-tier services whose rates are vintage as required; services used by the handicapped; and Universal Emergency Number 911 Services.

Upon consideration of these items, we have decided that no increase should go into effect for variable term payment plans other than the month-to-month option; vintaged rates applicable to two-tiered services; and services used by the handicapped. With respect to items tariffed after August 1981, we limit the exemption from the across-the-board increase to rates for the sale of telephone equipment, Tariff P.S.C. Md. No. 213, approved under Transmittal No. 625, effective January 13, 1983.

In this proceeding, C&P proposes to increase the existing residential message unit rate from $.09 to $.10 and the business message unit rate from $.10 to $.11. MIG proposes that the residential message unit rate be increased to $.10 per call, but that the business rate remain at $.10.

Over the last several C&P rate cases, message unit rates have been increased at a rate well in excess of the increases for basic exchange service. In order to bring the level of these changes more in line with the rates for other services, message unit rates should not be increased in this proceeding. Accordingly, after consideration of this matter, the Commission finds that there should be no increase in message unit rates.

J. Miscellaneous.

According to Mr. Kemp, 10 local exchanges are proposed for reclassification into higher rate categories because the number weighted main stations within those exchanges have exceeded the present class limits by 5 percent or more for two consecutive review periods. In keeping with

present Commission policy, the Company's request is hereby granted.

In order to reestablish parity between business exchange access lines and business PBX trunks, the Company proposes to reduce the PBX trunk rate. Consistent with our primary decision to increase rates across-the-board without restructuring them, we will leave the PBX trunk rate undisturbed.

Consistent with the decision to generally increase charges on an across-the-board basis, we have rejected, at this time, the Company's proposal to restructure its installation and maintenance charges. Upon consideration of this matter, we have decided to permit an across-the-board increase in order processing and line connection charges.

IT IS, THEREFORE, this 18th day of February, in the year Nineteen Hundred and Eighty-three, by the Public Service Commission of Maryland,

ORDERED: (1) That the fair value of rate-making purposes of the telephone utility property of The Chesapeake and Potomac Telephone Company of Maryland, used and useful in rendering service to the public, averaged $1,505,988,000 for the 12-month period ended August 31, 1982.

(2) That the proposed rates filed in this proceeding by The Chesapeake and Potomac Telephone Company of Maryland, designed to produce $125,386,000 in additional gross annual revenues, are hereby rejected, as being unjust and unreasonable.

(3) That The Chesapeake and Potomac Telephone Company of Maryland is authorized to file with the Commission amended rate schedules which shall result in an increase of not more than $28,200,534 in gross annual revenue.

(4) That the amended rate schedules to be submitted in accordance with Paragraph 3 shall conform with the guidelines set forth in the "Rate Design" section of this Order and shall be subject to acceptance by the Commission and the designation by it of an effective date.

(5) That all motions not specifically granted by action taken herein are hereby denied.

(6) That The Chesapeake and Potomac Telephone Company of Maryland shall furnish this Commission with accurate and complete statements under oath and in convenient form, setting forth its revenues, operating expenses and other expenditures during the 12-month period ended on the last day of each month, such reports to be furnished as soon as may be reasonably practicable and convenient after the end of each calendar month during the period this Order remains effective.

FRANK O. HEINTZ,
LILO K. SCHIFTER,
WAYNE B. HAMILTON,
WILLIAM A. BADGER,
HASKELL N. ARNOLD,
Commissioners.

Appendix 1

Case No. 7661
C&P Of Maryland
Working Capital
Test Year Ending August 31, 1982
(amounts in thousands)

1. Cash Advanced	$41,657
2. Excise Tax Payable	(1,759)
3. Lag in Payment of Pro Forma Interest	(9,257)
4. Lag in Payment of Pro Forma Preferred Dividends	(145)
5. Cash Working Capital Requirement	$30,496

Appendix 2

Case No. 7661
C&P Of Maryland
Rate Base
Test Year Ended August 31, 1982
(amounts in thousands)

Plant in Service	$2,180,416
Accumulated Depreciation	(513,399)
Net Plant in Service	1,667,017
Property Held for Future Use	666
Plant Under Construction	43,112
IDC on Short-Term Plant	10,548
Materials & Supplies	16,299
Cash Working Capital	30,573
Capitalized R&SE-Net of Deferred Tax	3,546
Capitalized BIS-Net of Deferred Tax	605
Deferred Tax Amortization	2,608
Western Electric Accounts Payable	(15,930)
Accumulated Deferred Taxes	(237,418)
Customer Deposits	(5,134)
Customer Advances	(1,379)
Contractor Retentions	(356)
Pre-1971 Investment Tax Credits	(2,649)
Reserve for Uncollectibles	(995)
Expensing Station Connections	(2,610)
Computer Inquiry II	(2,046)
Separations Changes: SPF, CPE	(469)
TOTAL ADJUSTED RATE BASE	$1,505,988

Appendix 3

Case No. 7661
C&P Of Maryland
Net Operating Income
Test Year Ending August 31, 1982
(amounts in thousands)

Net Operating Income-Book	$133,077
Adjustments	
Out-of-Period State Income Tax	118
Out-of-Period Revenue Adjustment	755
Out-of-Period License Contract Credits	(27)
1980 FIT Accruals	195
Tariff Increase — March 1982	28,141
Expensing Station Connections	(10,302)
Directory Increase	2,444
Benefit Plan Changes	(1,747)
Payroll Tax Changes	(280)
Wage & Salary Increases	(15,612)
License Contract Disallowances	3,362
Advertising Expense Exclusion	98
Removal of BIS Expenditures	605
Conduit and Cost Sharing Disallowances	734
Other Tax Increases	(319)
Postage Rate Increase	(28)
Separations Changes	(639)
Expensing of Minor Purchases	(489)
Reorganization	1,380
Discontinue Hotel & Motel Commissions	39
Company Telephone Service	465
Legislative Advocacy	53
Contributions	34
IDC on Short-Term Plant	3,289
Subsidiary Formation Costs	601
Amortization — Surplus DFIT	2,913
Pro Forma Interest	5,910
Amortization Of Previously Deferred R&SE-7591	(194)
Computer Inquiry II	7,401
TOTAL	$161,977

Appendix 4

Case No. 7661
C&P Of Maryland
Summary
CI-II Adjustment
(amounts in thousands)

RATE BASE

Assets to be Transferred to ABI	$(2,046)
Total Rate Base Reduction	$(2,046)

NET OPERATING INCOME

Revenues	
Local Service Revenues	$(4,356)
Uncollectibles	(22)
Total	$(4,334)
Expenses	
Maintenance	$ (395)
Depreciation	(133)
Commercial	(11,361)
Relief & Pensions	(2,716)
GS&L	(2,023)
Operating Rents	(537)
Total	$(17,165)
Taxes	
FIT	$6,305
State, Local, and Other	(875)
Total	$5,430
Operating Income Increase	$7,401

Before The
Public Service Commission of Maryland

Case No. 7661

February 18, 1983

In The Matter of The Application of The Chesapeake and Potomac Telephone Company of Maryland For Authority to Increase and Restructure its Schedule of Rates and Charges.

William A. Badger, Commissioner, Dissenting in part and concurring in part.

While I join with my colleagues in the general findings and conclusions contained in the Opinion and Order, exception is respectfully taken to that part of the majority decision which permits an increase in the rate for local coin telephone calls.

In this proceeding, The Chesapeake and Potomac Telephone Company of Maryland (C&P) has been granted authority to increase the charge for a local coin telephone call from 15 to 20 cents. C&P's proposal to increase coin call rates was not predicated on increased costs associated in the provision of this service. Instead the Company characterizes local coin service as essentially a convenience service and, as such, believes it appropriate to utilize the additional revenues as a means to permit lower rates for other classes of monthly service.

An increase in the local coin rate was opposed by the Office of People's Counsel on the basis that cost studies undertaken by their office indicate that the current 15 cent rate is compensatory. In addition, People's Counsel recommends that reduced coin rates should be available for those customers who depend upon the coin telephone as a substitute for basic service.

I believe the decision to increase the cost of local coin telephone calls is inappropriate for several reasons. C&P, under tariffs filed with this Commission, enjoys considerable discretion in the placement of coin telephone stations throughout the state. A primary objective of the company associated with coin station installations is to provide a valuable service that will meet the needs of the community. In carrying out these responsibilities, the Company selection of locations for coin stations is guided only in part by a profit motive. In addition, social policy considerations also influence such installations, as evidenced by the presence of coin telephones along major highways to provide prompt and easy access to the telephone network in the event of emergencies.

This Commission has recognized that "value of service" and "social needs" should be considered in designing rates for telephone service to the extent permitted under the Public Service Commission Law. This "value of service" principle is clearly evident from rates authorized in this proceeding where business exchange customers will pay higher rates for basic service and message units than will residential customers. Conversely, rates for services provided to the hearing impaired will not be increased in this proceeding.

In my opinion, these rate design principles should also be extended to rates established for the use of local coin telephones. Under this concept a 25 cent rate would apply to all such coin phone installations located in such areas as airport, railroad and bus terminals, hotels, restaurants, convention centers and stadiums. The current 15 cent coin rate would be retained to recognize the nature of use associated in the coin stations located at schools, hospitals, nursing homes, senior housing and low-income housing projects as well as major highways.

The adoption of this type of rate design in this proceeding would have generated additional revenues not only to reduce monthly rates for basic exchange customers

but would also insure the continuation of low cost service to those that may rely on coin telephones for essential telephone service.

United States District Court
District of Maryland

Civil Action No. 83-855

The Chesapeake and Potomac Telephone Company of Maryland,

Plaintiff,

v.

Public Service Commission of Maryland,
Frank O. Heintz, Chairman,
William A. Badger, Commissioner,
Lilo K. Schifter, Commissioner,
Wayne B. Hamilton, Commissioner,
Haskell N. Arnold, Commissioner,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

(Filed March 23, 1983)

Plaintiff The Chesapeake and Potomac Telephone Company of Maryland, based upon the verified complaint and the attached memorandum and affidavits of David M. Gillis and Paul D. Kemp, respectfully moves this Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure, to issue a preliminary injunction enjoining the Defendants from the operation, enforcement or execution of that portion of Order No. 66114 of the Maryland Public Service Commission that prevents Plaintiff from collecting intrastate charges for telephone services based on depreciation rates prescribed by the Federal Communications Commission.

Plaintiff is losing $44,000 in revenues a day and is being substantially and irreparably harmed because, under applicable regulatory law, it cannot retroactively recover this lost revenue. By contrast to the harm Plaintiff is suffering, its customers can be completely protected from any harm of paying more than just and reasonable rates by Plaintiff collecting these intrastate charges subject to refund with interest. A serious question has been raised by Plaintiff's Complaint, and in another case directly on point, a preliminary injunction was issued. Issuance of a preliminary injunction enjoining Defendants from preventing Plaintiff from collecting intrastate charges for telephone services based on FCC-prescribed depreciation rates will be in the public interest because it will stop Defendants from obstructing national telecommunications policy.

Respectfully submitted,

J. WILLIAM SARVER
One East Pratt Street
Baltimore, Maryland 21202
(301) 393-7725

D. MICHAEL STROUD
1710 H Street, N.W.
Washington, D.C. 20006
(202) 392-5121

DONALD N. ROTHMAN
ROBERT W. KATZ
GORDON, FEINBLATT, ROTHMAN, HOFFBERGER, AND HOLLANDER
233 East Redwood Street
Baltimore, Maryland 21202
(301) 752-4567

Attorneys for The Chesapeake and Potomac Telephone Company of Maryland

ROBERT A. LEVETOWN
MARK J. MATHIS
MICHAEL J. MORRISSEY
Of Counsel

AFFIDAVIT OF DAVID M. GILLIS

David M. Gillis, being duly sworn, says as follows:

1. My name is David M. Gillis.

2. I am over 18 years old. I have personal knowledge of the facts contained in this affidavit. I am Comptroller of The Chesapeake and Potomac Telephone Company of Maryland ("C&P") and held this position when Order No. 66114 was issued by the Public Service Commission of Maryland on February 18, 1983. My responsibilities include maintaining C&P's books of accounts and issuing its financial reports.

3. The amount of gross annual revenue at issue in this case is $16.1 million based upon the depreciation rates prescribed by the FCC. This amounts to $44,000 in revenue a day.

David M. Gillis

Subscribed and sworn to before
me this 21st day of March, 1983

Teresa A. Boarman
Notary Public

Notary Public State of Maryland
My Commission Expires July 1, 1986.

In the United States District Court
For the District of Maryland

Civil Action

No. H-83-855

C&P Telephone Company

Plaintiff

v.

Public Service Commission, et al.

Defendants

TRANSCRIPT OF PROCEEDINGS

(Filed June 29, 1983)

The above-entitled case came on for trial before His Honor, Edward S. Northrop, at 10:00 a.m., April 6, 1983, at Baltimore, Maryland.

Appearances

For the Plaintiff: No. 83-1403

Michael Stroud, Esquire
Mark H. Mathis, Esquire
J. William Sarver, Esquire
Donald N. Rothman

For the Defendant:

Kirk J. Emge, Esquire
James H. DeGraffenreidt, Jr., Esquire

VOLUME II

(2) PROCEEDINGS

THE CLERK: The matter now, pending before this Court is civil docket N-83-855, Chesapeake and Potomac Telephone Company of Maryland versus Public Service Commission of Maryland, et al. For the plaintiff, Donald N. Rothman, J. William Sarver, Mark H. Mathis and D. Michael Stroud. Counsel for the defendant is Kirk M. Emge. Counsel for the proposed intervenor, James H. DeGraffenreidt, Jr. This matter now comes on for hearing on motion for plaintiff for preliminary injunction.

MR. ROTHMAN: May it please the Court, I would like to introduce to the Court a motion which was filed — I understand somewhere in the transfer of papers it may have been misplaced for admission for purposes of this case of Dennis Michael Stroud, who is a senior attorney with C&P and who is a member of the bars of the District court, I mean District of Columbia Court of Appeals, the Maryland State Bar, and Pennsylvania State Bar, and who will be carrying the argument this morning on behalf of C&P and we would like to move his admission for purposes of this case.

THE COURT: He will be admitted.

MR. ROTHMAN: Thank you, sir. Also at the table is Mark J. Mathis, a general attorney for C&P, and William

Sarver, general attorney for C&P. Mr. Sarver is admitted to the bar of this court.

(3) THE COURT: Yes, sir. Okay.

MR. ROTHMAN: Thank you.

THE COURT: All right. Whose motion is it?

MR. STROUD: Good morning, Your Honor. First of all I would like to say thank you for the opportunity to appear before the Court today. Your Honor, the issues in this case are not very complex. They are, however, very important issues and they are relatively straightforward issues, Your Honor. They involve the implementation of national telecommunications policy. I would point out to Your Honor at the outset that there was a similar case decided recently by the District Court for the Western District of Washington out in Seattle which looked at essentially the question that is presented here this morning; that is, whether or not the defendants in this case who are individual members of the Maryland Public Service Commission can ignore a duly issued order of the Federal Communications Commission instead of implementing that order and pursuing whatever remedies are available to them under law.

Now, before I get into a substantive discussion of these issues, Your Honor, if I could I would just sort of like to set the stage with a few sentences of background regarding our company and I think it woul[illegible]ake all of this really clear. The Chesapeake and Potomac Telephone Company provides both interstate and intrastate telecommunications (4) services; that is to say, Your Honor, that the telephone set that would be on your desk for example is used to originate long distance telephone calls as well as calls that are purely local in nature.

Now, as a matter and as a result of this situation the Chesapeake and Potomac Telephone Company is regulated both by the Federal Communications Commission

and also by the defendants in this case. It is this fact, Your Honor, of dual regulation which indeed presents or forms the basis for the problem that we are discussing here today and here is why I say that. The FCC has concluded pursuant to its authority granted to it by Congress under the 1934 Federal Communications Act that state depreciation practices and procedures state depreciation rates which are inconsistent with those prescribed by the Federal Communications Commission, in fact, burden intrastate telecommunications traffic and the FCC has said that these practices must be preempted and, in fact, Your Honor, on January 6th of this year it issued an order preempting the state commissions. That order was served on the defendants in this case and even though that order mandated, Your Honor, that the defendants implement the depreciation rates prescribed by the FCC, the defendants failed to do so. Thus, in C&P's last general rate case instead of calculating C&P revenue requirements using rates mandated by the FCC, the defendants in this case simply (5) ignored them and acted contrary to law.

I would ask you, Your Honor, to contrast what the defendants did here, they did not seek review of the FCC's order as its sister commission did in Virginia, for example, in the Fourth Circuit Court of Appeals. Instead, the defendants just willfully disobeyed the order. Now, a minute ago, Your Honor, I mentioned that a similar case was decided recently out in Seattle and in that case the plaintiff was the local telephone company out there the Pacific Northwest Bell Telephone Company and in that case the defendants were the Washington Transportation and Utilities Commission. Our role was similar — our role today is similar to the role played by Pacific Northwest Bell in that case and the defendants here, of course, are the same as the commission in that case.

Now, there as here, Your Honor, the defendants received the January 6th order which directed that they implement these FCC depreciation procedures. There as here the defendants refused to comply with that order.

There as here, Your Honor, the plaintiffs went into Federal District Court seeking injunctive relief under Section 401(b) of the Communications Act. And there as here the defendants attempted to avoid judicial review of their conduct by claiming that they were not persons within the meaning of Section 401(b) of the Telecommunications Act. That argument, (6) Your Honor, was rejected by the District Court in Seattle.

Nevertheless, even though it was rejected, the defendants offer that same defense to Your Honor this morning, and they set forth basically two claims as to why they are not persons within the meaning of that statute. First of all, they claim that the statute does not reach the individual members of the Public Service Commission acting in their official capacity; the second claim that they advance is that Section 401(b) was designed to reach violations of FCC orders by private individuals rather than public service commissions. Now, Your Honor, as I am sure you have looked at the papers filed by the defendants in this case, there is absolutely no citation of authority for this proposition. That same argument was advanced to the Court in Seattle, it was rejected. There is no authority whatsoever to support that position today; it should be rejected today.

Moreover, Your Honor, I would ask you to consider the logicalness of such an argument. If this Court were to adopt the construction of the statute urged by the defendants in this case, that would mean that the state commissions would be free to sort of pick and choose which of the FCC's orders they would elect to implement; and when challenged on the ones that they refused to implement, would simply attempt to shield themselves by claiming that they were not persons within the meaning of Section 401(b). Such an order — what (7) this would mean, Your Honor, that many orders of the FCC would not and indeed could not be enforced. The Court in Seattle rejected this argument. It concluded that Congress could not have intended such an anomalous result. Instead, that

court concluded that what Congress intended — that the defendants in this case, like all other defendants, prosecute any grievances that they might have against the FCC orders in the U.S. Courts of Appeal. As a result of that construction of the Statute, the Seattle court rejected this claim.

We would ask Your Honor to reject it here this morning as well. Section 401(b), Your Honor, sets forth several preconditions to the issuance of an injunction. With the exception of the meaning of the word person which the defendants dispute, there is virtually no dispute that every other precondition of the statute has been met. Nevertheless, the defendants assert basically two reasons as to why an injunction should not issue. First of all, they suggest that the issuance of an injunction in this case might violate the principles of comity as embodied in the Johnson Act. The other argument they make is that the company indeed has not satisfied the Fourth Circuit's requirements for the issuance of injunctive relief and I would like to discuss both of these points, Your Honor, just very briefly.

The Johnson Act is set forth in 28 USC 1342, and it is quite specific. In order for the Johnson Act to bar (8) the granting of injunctive relief, each and every condition of that Act, Your Honor, has to be met and those conditions are stated in the Act in the conjunctive. In point of fact, under the facts of this case those conditions have not been met; the very first condition of the Johnson Act indeed has not been met. Under the Johnson Act the requirement is that jurisdiction in the District Court must be based solely upon either diversity of citizenship or repugnance of the order issued by the defendants to the federal constitution. However, if the Court reviews our papers, it is clear that we are filing this action today under 47 USC Section 401(b) which is a federal statute. If the Court reviews our underlying complaint, you will also see a count which sounds under Section 220(b) of the Federal Communications Act. We are not here on the basis of diversity of

citizenship; we are not here as a result solely of the repugnance of the Commission's order to the constitution. Accordingly, Your Honor, that should end any discussion of the Johnson Act but, if the Court wanted to look further, there is also the problem that the violation which we are addressing today affects intrastate commerce, again taking our action outside the scope of the Johnson Act.

Now, the cases cited by the defendants regarding these matters either did not result in the Johnson Act barring the injunctive relief or are distinguishable under (9) our facts. So, a final point I might add, Your Honor, the court in Seattle carefully considered the Johnson Act arguments, it was advanced by the defendants out there as it is here today, and it was rejected.

Defendants also argue that general principles of comity should exercise the Court here today. However, the principles of comity does not likewise apply. The reason they do not apply the doctrine that is designed to preclude the district courts from causing needless friction with the states in the administration of state affairs, their own state affairs. Thus, if we were discussing here at what rate for example should be charged for unlisted telephone numbers which is what the discussion was in one of the cases cited by the defendants here, the Tucker case, then perhaps that would be a situation, Your Honor, in which comity or principles of comity would apply. But where in the instant case the state commission has blatantly disobeyed a duly issued order of the Federal Communications Commission, an order which affects interstate commerce then the District Court must not retire, Your Honor. Instead, the District Court must declare the law and enforce the law and the Younger case cited by the defendants does not alter that conclusion. Indeed the Younger case expressly recommends that federal courts may enjoin in state actions when expressly authorized by Congress. Congress has so authorized in Section 401(b).

(10) Another argument advanced by the defendants is that the Court decline to exercise jurisdiction because this case is still pending before the Maryland Public Service Commission on a petition for reconsideration. The fact of the matter is, Your Honor, that the company did petition for reconsideration on some points but it expressly did not petition for reconsideration regarding the depreciation issues. We did ask that the commission give us the opportunity to collect the revenues which are in dispute here today while we pursued our remedies in Federal Court and, indeed, if that request had been granted we probably wouldn't be here today. But I would like for the Court to bear in mind as you consider this, consider whether or not we still have a remedy pending before the Public Service Commission. There is no rule that requires the Maryland Public Service Commission to act within any specified time limit on questions of reconsideration. In fact, the C&P petitioned for reconsideration in case number 7467 over two years ago and to this day we have not received a response from the defendants.

Now, having established, Your Honor, that the Johnson Act does not apply for the comity principles embodied in it, the only question remaining in it is whether or not the C&P has met the Fourth Circuit's requirements for injunctive relief. Here when I talk about the requirements I (11) am referring to the requirements enunciated in the Blackwelder case cited by all the parties here. As you know, Your Honor, the Fourth Circuit follows the balance of hardship test and under that test the threshold question is whether or not the risk of harm to the plaintiff C&P if the injunction is not issued outweighs any risk of harm to the defendants if the injunction is granted and the underlying issue ultimately decided in the defendant's favor. In its papers C&P has established that it is losing revenues in the amount of $44,000 a day — $44,000 a day, Your Honor! And that this harm is irreparable because the Maryland Commission lacks the authority to order retroactive rates. There is no way that we can recoup this.

The defendants have put forth two arguments which are designed to show that the harm C&P is suffering is not irreparable. Now, even though the defendants concede that the Maryland Public Service Commission lacks the authority to order retroactive rates, it nevertheless argues that this Court has the authority to order retroactive rates. They never explain how you get around the Maryland precedent that says you cannot. They never explain why it is improbable for the Commission to order retroactive rates but it would be proper for the Court to do so.

THE COURT: Your contention is that the Commission can fix the rate, isn't that your position?

(12) MR. STROUD: My position is that the Commission could fix the rate on a forward looking basis.

THE COURT: What about this one, 2.2 percent, but they have the power to fix it, don't they?

MR. STROUD: They have the power to fix the 2.2 percent rate from this date forward but they don't the right to fix the rate from today back two years. That is our contention.

THE COURT: Who does that?

MR. STROUD: That is your irreparable harm.

THE COURT: If they have the power to fix the rate they can fix it from this day forward and you would be satisfied, wouldn't you?

MR. STROUD: Well, we would be satisfied only as this date forward, Your Honor—

THE COURT: Who does the other? That is the Fourth Circuit who does that then, isn't it?

MR. STROUD: No, Your Honor. What I am saying is from January 6th — really from the date of the

defendants' order in this case, February 18th, forward up until the time that this Court decides, we have lost each day $44,000 which cannot be made up. This Commission cannot make it up, indeed as I will demonstrate in my argument that even the Court can't make it up. That is our irreparable harm and the reason we are here today to preclude that harm from (13) continuing into the future.

THE COURT: Your contention is that nobody can do anything for you?

MR. STROUD: That's right, not for the time that already expired.

THE COURT: Okay.

MR. STROUD: That is the irreparable harm in this case.

THE COURT: All right.

MR. STROUD: Now, with respect to whether or not this Commission could order the — rather this Court could order the State Commission to make us whole, and that is the discussion we just had, the fact of the matter is that the Court cannot order the Commission to do anything which it has not been empowered to do by the Maryland legislature and this Commission has held that it has no legislative authority whatsoever to engage in retroactive rate making, it has no authority to set future rates to recover past losses.

Finally, Your Honor, the District Court itself cannot engage in the rate making function because that function is generally conceded to be a legislative rather than a judicial function.

The second argument advanced by the defendants is that depreciation is a so-called non-cash expense and, therefore, C&P is not really being harmed. But this (14) argument, Your Honor, ignores reality, it ignores the reality of the world in which C&P operates and it

certainly ignores the entire purpose for depreciation. Depreciation, as the Court understands, is a power by which C&P recovers its investment in plant and property used to provide telecommunications service. Now, when that property — or if when that property is consumed, Your Honor, either through obsolescence or our inability to repair it and put it can back into servucem if C&P has not recovered its investment in that equipment at the time that that event occurs then C&P simply has to go out to borrow money to refinance the plant. So it is because C&P does not have the $44,000 each day that it requires that we are being irreparably harmed. C&P has to go out and borrow hard cash because of the fact at that time defendants are precluding us from recovering our capital investment in an orderly fashion. So it is a non-cash issue, Your Honor. We simply don't have the cash.

The second element of the balance of hardship test is also met, Your Honor, and I say that for this matter in contrast to the harm which C&P is suffering, the $44,000 a day, only a 2.2 percent rate increase would be required to cover the depreciation expenses which are at issue here. This would mean, Your Honor, an increase in basic service rates across this state of only a penny a day or less. We (15) would submit that such an increase would not burden the ratepayers of this state.

In addition, there is absolutely no risk of harm to the ratepayers of this state because C&P has volunteered to collect these additional revenues and to return them to the ratepayers if we are unsuccessful on the underlying complaint, with interest. Now, the claim that any increase in telephone rates would cause subscribers to give up their telephone service indeed really rings hollow, Your Honor, when the facts show that in Baltimore City, for example, if the rate increase we are requesting here were granted it would only increase telephone rates by a penny a day. Thus when the facts are weighed, Your Honor, the scales tip in favor of the plaintiffs and in favor of issuance of this injunction.

Under the Blackwelder case, the only other question remaining before this Court is whether or not our complaint presents a serious question. C&P submits and the Court in Seattle held, that the failure of a state agency to follow a duly promulgated order by the Federal Communications Commission indeed constitutes a serious question. Therefore, under the law of this jurisdiction, Your Honor, the company is entitled to the injunction.

The defendants cite the Airport Commission of Forsythe County (phonetic) as authority for their argument (16) that this Court has to look at the likelihood of success on the merits, but in the Blackwelder case the Court pointed out that the Forsythe standard only applies for cases on the appellate level. It does not apply in the District Court. Therefore, the question of likelihood of success on the merits is not a proper matter to be considered by the District Court. Even if the Court wanted to look at it we are virtually one hundred percent sure we would prevail in this case because there is no question that the defendants in this case violated the FCC's order. Furthermore, Your Honor, the defendants concede that the question of the legality of the FCC's order. The issue on the merits is not before this Court, that is a matter for the Fourth Circuit Court of Appeals.

I want to address one final point, Your Honor, and then I will sit down, and that is the public interest. First I would like for the Court to consider as it decides this case the public interest as expressed by the Federal Communications Commission; that is the interest in developing competitive dynamic telecommunications.

The other interest I would like for the Court to consider is our interest in a federal system of government. Now, under that system inconsistent state action or inconsistent decisions by the state must give way to the federal decision unless that federal decision is overturned (17) through lawful processes as the Court stated in Blackwelder, and I just want to paraphrase this, the presence of

a federal statute prohibiting the alleged acts of the defendants and supplying the gravamen of the complaint aligns C&P in setting our company's rate in the stead of the public's interest. This is so especially where, as here, the statute expressly authorizes interlocutory injunctive relief.

So, in conclusion, Your Honor, I would strenuously urge that this case is on all fours with the decision that was rendered in Seattle; the issues are identical, the rulings would be too. The defendants have elected to ignore lawful procedures and have elected to ignore a duly promulgated order of the FCC. Now, Your Honor, I would like to contrast what the defendants have done in this case with what the Virginia State corporation has done only yesterday. In deference to the preemption order which they received shortly after January 6th, it has permitted C&P of Virginia to implement depreciation proceeds which the state commission opposed previously on the basis that they have to follow the law and the preemption order is the law until it is reversed.

THE COURT: Who fixed it?

MR. STROUD: Who fixed the law, Your Honor?

THE COURT: No, no. Who fixed the rate or whatever it was, the depreciation.

THE WITNESS: The Virginia State Corporation (18) Commission.

THE COURT: They did?

MR STROUD: Yes, Your Honor, the depreciation rate, however, was set by the FCC.

THE COURT: But then the Commission fixed the rate?

MR. STROUD: That's right, Your Honor.

THE COURT: Okay.

MR. STROUD: Now, the C&P had requested the Commission be enjoined from preventing C&P from collecting an additional 2.2 percent across the board increase. Now, there is a difference between our case and the case in Seattle, the Maryland Commission has already stated because of the pending divestiture of the Bell companies from the AT&T and the need to restructure C&P's rates following that event, the appropriate rate to generate the rates required to increase the rate is broad. Now, the Commission should not complain that it wants a different rate merely because it is required to follow the FCC's preemption order. Now, moreover, returning this case to the defendants as was done in Seattle may render this entire procedure a gesture in considering the FCC described depreciation rates if they elect to reduce some other cost such as rate of return for example, thus resulting in no increase in revenues to the companies. Other costs will not decrease because the depreciation decreases are— (19) remembering we are going to have to pay the same wages and the same interest rates.

THE COURT: I don't understand what you are saying, now.

MR. STROUD: What they have suggested, Your Honor, is that the Court send this case back to them.

THE COURT: Yes.

MR. STROUD: So they could fashion rates rather than just go across the board, that they may consider what impact, if any, the allowance of this expense will have on C&P's overall financial picture.

THE COURT: Yes.

MR. STROUD: And if they, for example, may say well, we think that we are bound by the Federal Court's decision to put these depreciation rates in place, but we think as a result of doing that we ought to reduce some other costs so that the net result is no change in your our revenues, then we haven't advanced our cause at all.

THE COURT: What do you want me to do about that?

MR. STROUD: What I would like for you to do is simply direct the defendants to implement the 2.2 percent rate increase today consistent with the decision that they made on February 18th, referring this across the board increase.

If there are no further questions, Your Honor—

(20) THE COURT: Not right now.

MR. STROUD: Thank you.

MR. EMGE: Your Honor, if it please the Court, my name is Kirk Emge and I am an attorney with the Public Service Commission and I am here representing the Public Service Commission and the named defendants. There are very, very serious questions raised by the complaint and the request for preliminary injunction as filed by the plaintiff but I will try to be as brief as possible in responding to their motion and the arguments that they have made today.

For reasons that are set forth in our memorandum and for which I will briefly pass upon today, the defendants contend that this Court does not have jurisdiction to entertain the complaint that they have filed — the plaintiffs have filed, nor to issue the preliminary injunction that they seek. Assuming that the Court technically has jurisdiction over this matter, what is before Your Honor today is a classic example of a case where considerations of federal and state comity, which are the corner stone of our federal system, require a federal court to decline to intervene in a vital state matter and issue an injunction, particularly when the plaintiffs have available to them, but have not elected at this point to pursue, adequate remedies in state court. It was actions such as the action that was filed by C&P that prompted Congress to enact (21) the Johnson Act to prevent utilities from forum shopping in matters involving utility rates when they had an adequate and speedy remedy in the state courts. Clearly C&P is forum shopping in this

case, they obviously have a right under Maryland law to go into the state courts and seek judicial review, that remedy is a speedy remedy. The same powers that this Court has an equity court in Maryland has and if they are irreparably injured, which we claim they are not, they can certainly seek appropriate relief from a state court rather than this Court in involving itself in matters that are purely local state matters.

What C&P has done is selected this forum to ask this Court to make one decision in a case that involves 30 or 35 interrelated issues of which this is one. What they are seeking this Court to do is to establish rates in Maryland, they are seeking from this Court a $16 million rate increase. Now, they have not presented to you any evidence that a $16 million rates increase is required for them to have just and reasonable rates, or to result in rates that don't confiscate their property. There is no evidence at all with respect to that. What is before Your Honor is a simple mathematical calculation of a revenue requirement in affect, associated with but one issue and as we have stated rate cases involve consideration of many, many interrelated issues and they involve the exercise of expert judgment. And, with respect (22) to rates for telephone service, Congress in the Communication Act has wisely left the states to have exclusive authority over establishing intrastate telephone rates.

THE COURT: You don't recognize they got dual authority here in this particular instance. You see, in the local ratemaking body—

MR. EMGE: Your Honor, there is dual authority and it is clearly set forth in the Communications Act the Federal Communications Commission has sole authority over interstate telephone rates. Congress has given the state themselves and through the states themselves the state commissions sole authority over interstate. We certainly recognize the dual authority alluded to by the plaintiffs. Now, I will get to our specification with respect to the

various questions relating to jurisdiction and the need for preliminary injunction.

I think it is important at this point to realize that what is before this Court today, despite the many arguments of the plaintiffs, is only the issue as to whether the Court should exercise its discretion and issue a temporary injunction. We are not here to try the merits, we are not here to convince you that the FCC can or cannot preempt the Maryland Commission's ratemaking authority over intrastate services. As outlined in our memo and as (23) indicated by the District Court in Seattle, the only basis for jurisdiction of this Court is found, if it exists at all, in Section 401(b) of the Communications Act. And that depends upon whether one considers the Public Service Commission or a state agency like the Public Service Commission to be a person within the definition of that Act. Now, the Court in Seattle concluded that our sister commission was a person, but it also indicated that this was a case of first impression; this is the first time that this particular provision of the Communications Act has been construed by a Federal District Court in this type of matter. That is why there are no case citations in our memorandum and that is why there is no support case citation-wise for the District Court's decision in Washington that indicates the Commission should be considered a person for purposes of enforcement of the Act.

Now, there are very good reasons why the Commission should not be considered to be a person. As the Supreme Court noted in the Palmer case, when the problem of construction inflicts one of the recurrent statutes, striking a balance between national and state authority. In one of the most extensive areas of government, the statute should be construed to avoid inroads by implication into state authority. That is what they are suggesting that you do. If you read the definition of person, there is no entity in that (24) definition that remotely resembles a governmental agency. They are private entities that are defined in the Communications Act as persons. And the

reason for that is clear, Congress did not want the FCC regulating state commissions, they are only to regulate carriers, intrastate telephone service carriers.

In addition, unlike private parties, state governmental decisions are reviewable in the courts. The plaintiff claims that there is no mechanism for enforcing the FCC's decision if the Commission is wrong. That is completely untrue. The state courts have full authority under the Public Service Commission law to determine if our decision is contrary to federal law and if so, they will enforce that federal law. That is the mechanism for enforcement, review, judicial review in the state courts ultimately reviewable by the U.S. Supreme Court if the state courts are incorrect in their assessment of the federal law.

In addition, what we have as far as enforcement is concerned is not enforcement of an order against an individual private entity who is arguably acting to get private gain. What you have is an attempt to enforce an FCC order against a state agency that is arguably, and we believe correctly acting in the public interest as that agency perceives the public interest, so, there is a clear distinction. None of this discussion was included in the (25) District Court judges decision in the Pacific Bell case. He concluded that there was no means of enforcement. We maintain that there clearly is a mechanism for enforcement in the state courts, that the plaintiffs have not chosen at this point to pursue, he concluded that there was no rational reason for excluding commissions. I think there are very good reasons for excluding commissions from the definition of person, including the fact that our decisions are reviewable in state courts, the fact that we are a state agency, therefore, we are not private individuals and we are acting in the public interest, and because Congress has specifically given us the authority over intrastate services.

Now, to get to the Johnson Act, which is the other jurisdictional basis. If the Johnson Act applies, this Court

has no authority to issue an injunction. As the plaintiff indicated in its argument, there are four preconditions to the Johnson Act; first of all, it should be noted that no, there is no dispute that this is a rate order involved here, so the Johnson Act applies. The first condition is as the plaintiff indicated the cause of action not be based solely on citizenship or repugnance to the federal constitution. As the Federal Court appropriately noted in Seattle, if jurisdiction is not found under 401(b) it does not exist. Therefore, as we maintain 401(b) does not include the Commission as a person, therefore the plaintiffs have to fall (26) back on the argument that our decision is repugnant to the constitution and the first element of the Johnson Act is satisfied. First element is the effect, does the commission's order affect interstate commerce. The cases we stated in our preliminary brief I believe address that point adequately and I won't reiterate them here.

The Court held intrastate communications does not affect interstate commerce for purposes of the Johnson Act. The final two conditions I don't believe that the plaintiffs have disputed, one is that notice of hearing were held and there can be no dispute; and the other one an adequate and speedy, and I think if one reads the Public Service Commission law there is remedy under state law, and, it certainly is speedy because of Article 78 decision of the Commission, civil matters except for election causes and except for my knowledge there are no election causes pending in the circuit court in the state.

Now, we believe we have established that there is a lack of jurisdiction over this subject matter and, therefore, the injunction should not be issued, the preliminary injunction should not be issued. In the event you find that technically there is some jurisdiction over this matter, we maintain that there has been no showing by the plaintiff that the Court should exercise a sound discretion and issue a temporary injunction. First I think (27) there is basic agreement on what the four standards are in this circuit as far as issuing preliminary injunctions.

The first issue and I think a principal issue to be addressed is has C&P demonstrated that it will suffer irreparable injury if an injunction is not issued. First let me state that we vigorously dispute their contention that they are losing $44,000 a day. That $44,000 a day is based upon a mathematical computation of some abstract revenue effect associated with but one issue in a rate case. There has been no showing that if this Court directed that the Commission follow the FCC's preemption order, as the Court did in Washington, that that would be the result.

With respect to whether they are irreparably harmed, I think the defendants — the plaintiffs have failed to establish that they — that this Court or a state court could not fashion appropriate remedy in the unlikely event that they should prevail on the merits of this case. All of the cases that they allude to, the precedent in Maryland that is unnamed but alluded to in their argument, relate to a commission's authority to establish retroactive rates; the cases that we have cited in our memorandum deal with a Court's ability to fashion appropriate relief. What the plaintiffs are arguing or seem to argue or which they have not addressed adequately is that if a court does not have this authority. What value is their right to appeal if a (28) decision is made down the road and the Court can't come back and fashion appropriate remedy that would make them whole? What value do they have to take an appeal? And I think the cases that we have cited in our memorandum on this point discuss that very point.

In addition, I think the Court should consider the nature of depreciation expense. Depreciation expense is recovery of capital, it is not an actual cash expenditure that is now being paid out by the company. They are not paying out, they are not losing $44,000 a day. They indicate well, we are not getting the money and we have to replace this equipment at the present time so, therefore, we have to go out and borrow the money. What they don't tell you is if they have to go out and borrow the money and replace it then it is not recovered through depreciation expense.

That money they have to borrow is included in their rates and they are getting a return on it. In other words, if they have to for some reason need an unquantifiable amount of money that they have to go out and borrow because we didn't increase the rates, if they in fact have to go out and borrow that money they will be receiving compensation for that in their rates and that will be reflected and they will, therefore, not suffer any harm.

We think there has been a complete lack of any showing by the plaintiff, only conclusionary statements that (29) they will be irreparably harmed if the Court does issue the preliminary injunction. That is simply not true. There has been no showing that they have suffered and will suffer any harm if this Court fails to exercise its discretion. However, there will be clearly harm, substantial harm for some individuals, if this injunction is not issued. Maybe 2.2 percent does not sound like a large increase but for some people, on the bottom line there may be someone out there where service will be terminated because they can't pay that additional amount of money. I don't know that the plaintiff can say there isn't anyone out there, there probably is one out there are who will suffer irreparably if this injunction is issued. More importantly, and I think the Court if it reads our memo will see this, as well as when the Courts reads our memo it will see this point as well, the fact is that the customers who will be paying this increased rate now, if the Court issues an injunction, will not be the same customers who receive the refund somewhere down the road if the plaintiff is found to be wrong. What will happen is that there is constant customer turnover and new customers replacing old customers and new customers who are in existence when the Commission's decision is rendered. The customers who receive the refund, who didn't pay for the higher rates, will receive a windfall. So, there is harm. It is something that can't be brushed aside. The identity of (30) customers is a valid issue which would result in irreparable injuries to certain parties if this injunction is granted.

Now, with respect to the fourth test, which is the likelihood — the third test, the likelihood of success. The standard as outlined in Blackwelder and indicated by the plaintiff involves first a balancing of hardship. We maintain that when you balance the hardships it is clearly on the side of the ratepayers since the company is not going to be harmed in any way by not issuing the injunction. So, therefore, you do get to the likelihood of success on the merits. We are not trying the merits at this point but it should be noted that what the plaintiffs are seeking this Court to issue, what they want in the way of relief, is a declaratory injunction that the Commission's action violates federal law and, therefore, we are pre-empted. That issue is presently before the Fourth Circuit and will be decided by the Fourth Circuit on appeal by the Corporation's Commission of Virginia and others.

Now, this gives me an appropriate time to point out why our failure to take an appeal is irrelevant to the issues that are before the Court; the plaintiffs make a great deal out of this indicating that what we should have done was file the appeal and pursued the remedy there rather than what we did. What we did was, because we have an obligation under state law to set rates for intrastate telephone service and (31) that involves determining what we can and what we cannot do, that that is why we did what we did. Why we didn't file an appeal from the FCC's decision or why we didn't petition to intervene is also readily apparent. We knew Virginia was going to file the appeal, we have limited resources, we can't file appeals in every federal case that may involve our interest and we don't generally if we know that our interests are going to be adequately represented. But more importantly, we are a member of the National Association of Regulatory Commissioners, they are representing us. We filed a petition to intervene in the Fourth Circuit decision, so in effect we are a party in that proceeding through our participation in the national organization. So that two of the issues relating to that case simply is not relevant to what is before this Court.

With respect to the public interest, I think, several things should be said. One is that what they seek is an injunction that doesn't maintain the status quo but changes the status quo. The second is that the issuance of an injunction will directly involve — in the nature that the plaintiffs seek will directly involve this Court in ratemaking. They want you to set state rates. In their argument about irreparable injury they claim that you can't set retroactive rates because you could be engaging in ratemaking and that is a legislative function. But in effect (32) what they are asking you to do is issue an injunction that has the same affect to allow them to raise whatever rates they want. They are the ones that are the actors, they are the ones establishing the rate, but it will be Your Honor's order that permits them to do that.

THE COURT: Why won't you do it.

MR. EMGE: Your Honor, we have concluded that the federal law does not preempt us and, therefore, we are protecting the Maryland ratepayers' interest.

THE COURT: But won't you do it?

MR. EMGE: Oh, no, whatever Your Honor says, we certainly would obey Your Honor's order.

THE COURT: You are much more capable of doing it than I am, aren't you?

MR. EMGE: Your Honor, as we have noted in our memorandum, if the Court is inclined to conclude that it has jurisdiction and that a preliminary injunction should be issued, we would recommend strongly that the injunction merely instruct the defendants to obey the FCC's order in the pending petition for rehearing, and that is exactly what the Court in Washington did. We would strongly suggest that any order that permits C&P to establish intrastate rates without the approval of the Commission would be contrary to the public interest and would be inconsistent with the decision in the Washington Court. Now, the company has maintained (33) that their

petition for rehearing technically does not include or request that the Commission reconsider its decision on depreciation rates. Well, even if that were true, and we are not going to dispute it here, the Commission has full authority under Article 78 to rehear any matter on its own motion. And so, if Your Honor were inclined to issue such an injunction, the Commission certainly would have authority under state law to reconsider its decision with respect to that issue, and render an appropriate decision in accordance with Your Honor's instructions. And we would strongly recommend that course of action if Your Honor—

THE COURT: That's what the Washington Court did?

MR. EMGE: Oh, yes, Your Honor. You will notice when you read the order that the judge was very careful not to conclude that they were losing a hundred thousand dollars a month as the plaintiffs contended, he cross that language out. He also carefully included language that the defendants were entitled to spread the increase, whatever that amount would be, in any way they chose to be appropriate under state law, and did not limit it to an across-the-board increase.

THE COURT: All right.

MR. EMGE: Your Honor, we maintain that there is no jurisdiction over this matter under the relevant section of the Communications Act. However, as I have stated before, if Your Honor concludes that the plaintiff has shown that he (34) they will be irreparably harmed and that argument was not made in the Washington case. You will notice there is no discussion, there is just a discussion there was an irreparable injury, no discussion why. If Your Honor concludes there will be irreparable harm and outweighs the harm that will be imposed upon the ratepayers of the company and concludes that this is an appropriate case for the federal courts to intervene even though there is an adequate state remedy that the plaintiffs have not pursued, we would recommend that Your Honor merely issue an order which conforms in

general to the order that was issued by the District Court in the State of Washington and only instruct the defendants to — the binding nature of the FCC's preemption order. Thank you, Your Honor.

MR. DeGRAFFENREIDT: Your Honor, may it please the Court, I'm James DeGraffenreidt, representing the Office of the People's Counsel. I have pending before you a motion for leave to intervenue in his this matter as a matter of right under Rule 24(a).

THE COURT: Have you got an order?

MR. DeGRAFFENREIDT: I have not received an order.

THE COURT: Well, why didn't you draw an order? Has he got an order attached to it? Look through this for me.

(A pause in the proceedings.)

(35) THE COURT: No reason why you shouldn't intervene and you have to have an order attached here.

MR. DeGRAFFENREIDT: Your Honor, I hadn't been informed that it had been granted.

THE COURT: Because I just granted it.

MR. ROTHMAN: Your Honor I wanted to say on that—

THE COURT: You don't want me to intervene.

MR. ROTHMAN: We do not oppose it although we do not think it is a matter of rights since the interests of peoples' counsel—

THE COURT: We can argue about that.

MR. ROTHMAN: I just wanted the record to show that we believe their interest to be the same as the Public Service Commission and that they are adequately represented in this proceeding, but we do not oppose.

THE COURT: Well, we will let him say something, won't we?

MR. ROTHMAN: Yes, sir.

MR. DeGRAFFENREIDT: Your Honor, I will keep my comments brief because I feel that—

THE COURT: Sure, you have gotten plenty filed here.

MR. DeGRAFFENREIDT: I indeed filed a memorandum in opposition to the preliminary injunction requests, and I would simply like to reiterate that the issue before the (36) Court today is whether or not the C&P is entitled to a preliminary injunction, and I would like to re-emphasize, as I have done in my memoranda, that they have not met the criteria which are applicable for the granting of such a preliminary injunction.

The only point that I would like to emphasize is that the company has made the argument that they are suffering irreparable injury and that there will have been no harm to ratepayers in the balancing test that is set forth in Blackwelder. I agree, as you can see in my memorandum, with Mr. Emge that the company does not suffer irreparable harm because we are talking about a non-cash expense item which in the event that the — that their depreciation rates in effect do not permit the company to recover its capital, they recover it in rates from ratepayers and to the extent that they incur any kind of borrowing costs. So I would submit that they are not suffering any irreparable harm and indeed their affidavits don't even allege that they suffer harm. It is merely a blanket statement that $16.1 million is the amount in controversy and they leave it at that.

I would also point out that on the other hand, whereas the phone company is talking about a non-cash expense item if their preliminary injunction request is granted, real dollars are going to come out of the pockets of Maryland ratepayers to accommodate the basic effect of

the revenue (37) increase that would — that they allege is associated with the failure of the Public Service Commission to go along with the FCC's order. So I simply emphasize to you, in addition to the arguments that are already set forth in my memoranda, that the company does not suffer any irreparable harm and that there is a real harm in a sense that ratepayers would be paying real money if the intervening period pending final resolution of this matter. Thank you, Your Honor.

THE COURT: All right.

MR. STROUD: Your Honor, if I might have just a minute of rebuttal.

THE COURT: Yes.

MR. STROUD: First of all, Your Honor, I would like to address the first point. First, I would like to start with the part that Mr. DeGraffenreidt just ended up on, we are talking about a mere 2.2 percent increase, which increases telephone service throughout the state by a penny, under a bond that is refunded if the company is wrong. The other point I would like to point out with respect to the paying of rates, it would be our belief based upon the defendants' order in our last general rate proceeding that it has expressed a preference for across the board treatment and the Court could issue an injunction today to that effect.

THE COURT: Do what now?

MR. STROUD: Express the preference, Your Honor, (38) for an across the board rate increase in our last general rate increase.

THE COURT: You did that?

MR. STROUD: When we went in before the Commissioner.

THE COURT: What do you say about that, Mr. DeGraffenreidt?

MR. EMGE: I will have to speak too because the Commission did not unequivocally express a preference, they increased certain rates and others weren't increased.

THE COURT: We are stuck anyway we look at it.

MR. EMGE: And, Your Honor, it also was predicated the rate consideration is also interwoven with considerations of what the revenue requirement is.

THE COURT: I know that. I am trying to be amusing.

(Laughter.)

MR. STROUD: If we weren't suffering $44,000 a day harm, Your Honor, it would be. But I would like to just refer the Court if I could to the order issued for the defendants.

THE COURT: Well, I am not going to bleed for you, I can tell you that.

MR. STROUD: But I would like to refer the Court to pages 75 and 76 of the Commission's order and I think (39) therein is the discussion of this across the board rate increase.

THE COURT: What can I do about that?

MR. STROUD: The point I was making, Your Honor, is simply this, to address this irreparable harm quickly the Court could today direct the defendants to implement the 2.2 percent increase spreading that increase across the board in the same fashion that the Commission ordered at the conclusion of our last general rate case.

THE COURT: Why can't I more or less treat it in the same way that the District Court did in the state of Washington.

MR. STROUD: The reason I would suggest different treatment, Your Honor, first of all, they have just concluded a whole review of this question, how the rate

should be spread and they expressed this preference for an across the board treatment.

THE COURT: What do you have to say about that? Did you all come to an agreement on that?

MR. EMGE: Any increase in magnitude there has to be some determination what the revenue requirement effect is of following the FCC's order and I don't know with all due respect the Court has the expertise to determine that.

THE COURT: It certainly doesn't, I will be the first to admit it.

(40) MR. EMGE: The Court in Washington State clearly recognized that there was no time and they make a large point about this, there was no time contraints in the statute with respect to consideration for rehearing in Washington State either and the court still issued a decision.

MR. STROUD: Your Honor, if I might address that point, we are sort of hopping up and down, we are trying to follow the discussion. Perhaps the way out of this would be for the Court to direct the defendants to consider these depreciation requirements, direct the Commission to consider these depreciation requirements within some specified period of time, for example, ten days from the date of this Court's order for same. But we would request that the Court order the 2.2 percent increase today under bond with an instruction to the defendants that within 10 days they consider what impact, if any, this should have on the rate.

THE COURT: That makes sense.

MR. EMGE: Your Honor, that 2.2 percent rate increase would involve changing the rates in the state for a ten-day period and that seems to be totally unreasonable. The Commissioners will be unsure what the rates are — we had one rate change a month and a half ago and ten days from now another rate change.

THE COURT: But you did that on your own.

MR. EMGE: Your Honor, the company waited five (41) weeks after the Commission's decision to seek intervention, and it seems to me that they cannot argue we need ten more days, they waited five weeks.

MR. STROUD: Your Honor, I have to respond. First let me respond to the five weeks point. We did ask the Commission to allow us to put these rates in under bond. At the time we were filing our reconsideration requests there was no doubt in our mind that a sister Bell Company in Washington state was going down this road that we are going down today and certainly we didn't want to come in here without having the benefit from the Washington Court. Quite honestly, we waited for that decision. The point is, while we were waiting we were giving this Commission every possible opportunity to allow us to put these rates in subject to refunding and under bond; they have not yet done that. So the question of how long we waited is not really a relevant one, but if the Court wants to know our rationale, that is it. We were waiting for the precedence and we had to put the case together.

Now, if you look at the Seattle case, that case was decided on March 10th, we filed our case on March 21st. By the time we got the papers and the pleadings, found out what the issues were out there, we came into this Court as quickly as we could.

THE COURT: Well, I think because of the urgency (42) of the situation I have got to do something today and I will do it today. But in reference to a more learned let's say and careful opinion, I will probably get something out within a week, but I can give you some general lines here that I may be able to help you and let's see if you people can't get together and fashion an injunction which would be agreeable to both of you.

After considering the written submissions of the parties and the intervenor and having heard the oral arguments

today, I have come to the conclusion that an injunction should issue and I will render an opinion which I will get out, and be more careful in my language, and also as to the reasons for it, within about a week. I think that is all right with everybody concerned I assume.

MR. STROUD: Yes, sir.

MR. EMGE: Yes.

THE COURT: And anything I say here, of course, is subject to that opinion and the changes in that opinion and the facts and as to the law and the rest of it concerned, and of course to the editing of what I am about to say here today. I would change all that in the opinion but in reference to the conclusion I come to I will not change that.

I find that the plaintiff is entitled to relief requested and it is clear that the plaintiff will suffer an irreparable harm in the absence of the injunction requested (43) because the PSC is without power to order retroactive recovery of money and that the balance of harm is in the C&P's favor. This decision will not substantially harm other parties the Court feels because the provisions will be made for reimbursement by the C&P to these customers in the event the FCC erred in adopting its new depreciation standards and, of course, we will all track the Virginia case in the Fourth Circuit in that connection and wait for that result.

Insofar as the public interest is concerned we have an interest in this case as residents of Maryland and as residents of the United States who are entitled to some nationwide uniformity in the telecommunications field. That is congressional policy and this Court will abide by it. Therefore, no interest is overriding as the public interest and the mutual interest the public shares cannot be bifurcated under these circumstances. I think that that is the rule generally followed in the situation where there

is dual control over the matter like there is in this particular instance.

Finally, of course, I believe that there will be the likelihood of success by the C&P at the Fourth Circuit level. I am persuaded that the Washington case is more in line with the thinking of the courts in connection with this matter and is certainly a matter that the federal courts have cognizance of as I have expressed already above. (44) Nevertheless, I will not go so far as to accept on its face the C&P's conclusion that the rate they are entitled to is 2.2 percent. This decision will be left to the Public Service Commission.

Therefore, this whole situation will be turned back to the Public Service Commission and by order of this Court the Public Service Commission will and is hereby ordered to abide by the mandate of the FCC for these depreciation structures and the PSC will be given ten days to work this out with the plaintiff and establish a structure by compliance with the FCC. Additionally, the parties are instructed to establish a rebate structure which can be utilized in the future, if necessary, which will return to the consumers all excess monies paid into the system with interest. In the event the Fourth Circuit later determines these monies were not due and the FCC was in error, provision should also be made for those who terminate their services in the interim so that they may get the rebate either automatically or by application to the C&P.

I would like you to get together, therefore, and draw the proper injunction with the proper words in it as you know with reference to irreparable harm and other things that are necessary in conformity with the Blackwelder decision and I will sign it. Okay?

MR. EMGE: Thank you, Your Honor.

(45) THE COURT: All right, gentlemen. Thank you.

(Adjourned at 12:00 o'clock noon.)

(46) CERTIFICATE

I, Paul M. Mackaro, Official Reporter for the United States District Court for the District of Maryland, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and accurate transcript of the proceedings made in the aforementioned and numbered case on the date hereinbefore set forth, and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

Paul M. Mackaro,
Official Reporter.

(5)

No. 84-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a state utility regulatory commission is a "person" who is subject to enforcement proceedings under Section 401(b) of the Communications Act of 1934.

2. Whether Section 401(b) of the Communications Act of 1934 authorizes private party enforcement of Federal Communications Commission rulemaking decisions such as the "Preemption Order."

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a) is reported at 748 F.2d 787. The decision of the United States District Court for the District of Maryland (Pet. App. 11a) is reported at 560 F. Supp. 844. The Memorandum, Opinion and Order of the Federal Communications Commission (Pet. App. 40a) is reported at 92 FCC2d 864.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1984. A Petition for Writ of Certiorari was filed by the Public Service Commission of Maryland on February 15, 1985, within the time prescribed by 28 U.S.C. § 2101(c). This Court has jurisdiction to review the decision below under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, the regulations issued thereunder, and Article 78 of the *Annotated Code of Maryland* are reprinted in the Appendix, *infra*, A1-A9.

STATEMENT

1. This case concerns the authority of a United States District Court to issue a preliminary injunction under Section 401(b) of the Communications Act of 1934[1] enforcing a rulemaking decision of the Federal Communications Commission ("FCC") against a state utility regulatory commission. In the FCC decision which was enforced by the District Court, the FCC had concluded that the language and legislative history of the Communications Act, coupled with its authority to preempt state actions that interfere with federal policies, empowered the FCC to preempt inconsistent state depreciation policies and practices ("Preemption Order") (Pet. App. 40a-71a). After finding that the Public Service Commission of Maryland ("Md. PSC") was in disobedience of the "Preemption Order", the District Court issued a preliminary injunction on behalf of The Chesapeake and Potomac Telephone Company of Maryland ("C&P") which directed the Md. PSC to establish rates for C&P which would be sufficient to recover the intrastate revenue requirement

[1] 47 U.S.C. § 401(b).

resulting from the FCC-prescribed depreciation rates and methodologies (Pet. App. 11a-13a).

2. Local telephone facilities in the United States are used interchangeably to provide both interstate and intrastate telephone service. In enacting the Comunications Act of 1934, Congress established a dual system of regulation whereby control over the operations and facilities of local telephone companies would be the shared responsibility of federal and state or local authorities. Accordingly, Section 152(a) of the Communications Act[2] provided the FCC with jurisdiction over interstate and foreign communications, while Section 152(b)[3] expressly reserved to the states the authority to prescribe rates for intrastate and local service. *See also* 47 U.S.C. § 221(b).

3. The rates which are established for telephone service must include an appropriate allowance for depreciation expense. 1 A.J.G. Priest *Principles of Public Utility Regulation* 45 (1969). In general, "depreciation is the loss, not restored by current maintenance, which is due to all factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. Annual depreciation is the loss which takes place in a year." *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 167 (1934). Since there are numerous methodologies by which a utility's depreciation expense can be computed, the determination as to what constitutes an appropriate level of depreciation for ratemaking purposes involves the use of expert judgment by the rate setting authority. *See, e.g., Public Service Commission of Maryland v. Baltimore Gas & Electric Co.*, 273 Md. 357, 371-73, 329 A.2d 691, 699-701 (1974).

[2] 47 U.S.C. § 152(a).

[3] 47 U.S.C. § 152(b).

Under Section 220 of the Communications Act, the FCC has the authority to determine certain depreciation issues for the carriers that are subject to its jurisdiction. 47 U.S.C. § 220(a),(b). The statute also requires that the FCC provide state commissions with an opportunity to present their views and recommendations before any new accounting requirement for depreciation issues is implemented by that agency. 47 U.S.C. § 220(b),(h). The Md. PSC has, on occasion, submitted comments with respect to the use of certain depreciation practices by Maryland telephone companies. *E.g.*, *American Telephone & Telegraph Co.*, 88 FCC2d 1224 (1982); *Chesapeake & Potomac Telephone Co. of Maryland*, 90 FCC2d 964 (1982).

4. In 1980, the FCC amended its accounting rules to give carriers the option of adopting two depreciation practices permitting faster capital recovery: the "equal life group" and "remaining life" methods. *Amendment of Part 31, etc.*, 83 FCC2d 267 (1980) ("Depreciation Order"). In 1981, the FCC ruled that carriers should expense rather than capitalize their station connection costs. *Amend. of Part 31*, 85 FCC2d 818 (1981) ("Expensing Order").

Following the issuance of the "Expensing Order," the National Association of Regulatory Utility Commissioners and others filed a petition for clarification that FCC-prescribed depreciation policies were not binding on state commissions for purposes of intrastate rate making. On April 27, 1982, the FCC formally affirmed its long-standing and undisputed policy through a *Memorandum Opinion and Order* which stated that state regulatory commissions are not preempted by the FCC from adopting depreciation methods for purposes of intrastate rate making which are inconsistent with methods approved by the FCC. 89 FCC2d 1094 (1982). The Order (which was based on a full FCC review of the Communications Act, its legislative history, and years of case law), concluded that there was no clear Congressional intent to preempt

inconsistent state prescription of depreciation rates. *Id.* at 1106-07. The Order further stated that such state regulation would not frustrate or conflict with valid federal policies. *Id.* at 1108.

Thereafter, American Telephone and Telegraph Company ("AT&T") filed a petition in which it requested the FCC to reconsider this decision, while General Telephone Company of Ohio ("GTE") filed a petition for declaratory ruling in which it requested the FCC to preempt an order of the Public Utilities Commission of Ohio that denied GTE the same depreciation rates for intrastate purposes as had been prescribed by the FCC. These proceedings were subsequently consolidated and on January 6, 1983, the FCC issued its "Preemption Order." In that decision, the FCC reversed the findings of its "Memorandum Opinion and Order" and concluded that Section 220(b) of the Communications Act preempted state depreciation practices which were inconsistent with those which were prescribed by that agency (Pet. App. 48a). Moreover, the FCC also held that even if Section 220(b) did not automatically preempt the states, preemption of inconsistent state depreciation practices would be justified in order to avoid frustration of validly adopted federal policies (Pet. App. 56a). The FCC concluded by stating that where it prescribes depreciation rates for classes of property, state commissions are precluded from departing from those rates (Pet. App. 61a). Moreover, it noted that since the depreciation method utilized is a material part in determining the rate to be applied, state commissions are also precluded from departing from the depreciation methods prescribed by the Commission. *Id.*

Although the Md. PSC was not a party to the *Amendment of Part 31* reconsideration proceeding, other state commissions were, and several of these commissions appealed the FCC's rulemaking to the United States Court of Appeals for the Fourth Circuit. By a two-to-one

majority, the Court of Appeals affirmed the FCC's "Preemption Order." *Virginia State Corporation Commission v. FCC*, 737 F.2d 388 (4th Cir. 1984). This Court subsequently granted certiorari in *California v. FCC*, 105 S. Ct. 3496 (June 26, 1985).

C&P is a public service company and as such the intrastate telephone services which it provides in Maryland are subject to the jurisdiction of the Md. PSC. *Md. Ann. Code* art. 78, § 1, et seq. (1980 Repl. Vol. and 1984 Cum. Supp.). Among other powers conferred on the Md. PSC by Article 78 is the power to determine just and reasonable rates for all public service companies, including C&P. *Md. Ann. Code* art. 78, § 68(a) (1984 Cum. Supp.). Accordingly, the Md. PSC is a "state commission" as that term is defined in Section 153(t) of the Act. 47 U.S.C. § 153(t).

In July 1982, C&P filed an application for a rate increase for its intrastate operations with the Md. PSC. By Order No. 66114, which was entered in Case No. 7661 on February 18, 1983, the Md. PSC authorized C&P to file new rates for intrastate telephone service in Maryland (J.A. 50). Among other issues which were considered by the Md. PSC in determining C&P's revenue requirement was what constituted an appropriate allowance for depreciation expense. For various reasons which are set forth in its Opinion and Order, the Commission concluded that the depreciation practices established by the FCC in no way limited its authority to independently determine the appropriate level of depreciation expense to be reflected in intrastate rates for telephone service (J.A. 62-67). Furthermore, the Commission found that based upon the evidence on the record before it, the Company's proposal to adopt remaining life and equal life group depreciation for intrastate rate-making purposes was unreasonable and, as a result, its net operating income adjustment for this change was rejected (J.A. 67-70).

Instead of seeking judicial review of the rate order in the state court system, C&P filed a complaint in the United States District Court for the District of Maryland seeking declaratory and injunctive relief. The District Court granted a preliminary injunction and then closed the docket pending the outcome of the Fourth Circuit appeal challenging the validity of the FCC "Preemption Order." In the interim, the Md. PSC filed an appeal from the District Court's Order to the United States Court of Appeals for the Fourth Circuit. On November 20, 1984, the Fourth Circuit affirmed the District Court, holding that (1) the Md. PSC is a "person" and, therefore, subject to the jurisdiction of the District Court in enforcement proceedings brought under Section 401(b); and (2) the Preemption Order was an "order" within the meaning of Section 401(b) and, therefore, enforceable by the District Court under that Section (Pet. App. 3a-5a).

SUMMARY OF ARGUMENT

Section 401(b) of the Communications Act of 1934 authorizes a private party to bring a federal enforcement action against any "person" who disobeys any "order" of the FCC. Since the Md. PSC is not a "person" as that term is defined in the Communications Act and since the FCC's "Preemption Order" was the product of a rulemaking and not an "order," the District Court lacked jurisdiction under Section 401(b) to issue an injunction on behalf of C&P requiring the Md. PSC to set intrastate rates for telephone service utilizing the depreciation rates which were prescribed by the FCC.

It is apparent from a review of the language which was used to define "person," as well as a consideration of certain fundamental policies which are embodied in the Communications Act, that Congress did not intend the word "person" to encompass a "state commission." In this regard, the word "person" was defined by Congress in the

Communications Act in terms of entities whose characteristics in no way resemble the characteristics which define a "state commission." Accordingly, the plain meaning of the language used to define "person" does not include a "state commission." Moreover, such a construction furthers certain fundamental policies which are embodied in the Communications Act. In this regard, a consideration of the Act as a whole, as well as its history, demonstrates that Congress intended to divide the authority to regulate telecommunications between the FCC, whose authority only extended to interstate and foreign communications, and the respective states, who were provided with the sole responsibility to regulate intrastate telephone rates; neither is subject to the regulatory authority of the other. To the extent that state commissions improperly encroach upon the FCC's jurisdiction, their decisions are subject to reversal on review in the state court system. This view of the Act, coupled with the great deference which was accorded to state commissions by Congress, requires the exclusion of state commissions from the class of "persons" who are subject to the enforcement provisions of Section 401 of the Act.

However, even if a state commission is subject to the enforcement provisions of Section 401, a private party such as C&P cannot enforce the FCC's "Preemption Order" against the Md. PSC under Section 401(b) of the Act. The "Preemption Order" was issued in an FCC rulemaking proceeding and is nothing more than a statement of that agency which purports to interpret certain provisions of the Communications Act, to implement agency policy, and to establish a standard for future conduct. As such, the "Preemption Order" is the product of a rulemaking and is not an adjudicatory order.

Since the "Preemption Order" is not an adjudicatory order, it cannot be enforced by a federal district court under Section 401(b) of the Act. The enforcement scheme

which was established by Congress in Section 401 only permits the FCC to institute proceedings for the purpose of enforcing compliance with the Act. 47 U.S.C. § 401(a). Since the enforcement of FCC rules, regulations, and declaratory rulings in effect constitutes the enforcement of the Act itself, such proceedings can only be instituted by the FCC under Section 401(a). Alternatively, the FCC can determine in an adjudicatory proceeding that a specific action of a specific person is in violation of the Act or the rules and regulations it has promulgated under the Act. The order which is issued in such a proceeding can then be enforced by a private party under Section 401(b).

Finally, it is apparent that if the policy of promoting the development of a uniform, nationwide interstate communications policy permits the FCC to preempt inconsistent state depreciation practices, that policy also requires the FCC, rather than private parties, to enforce its "Preemption Order." Private enforcement of the "order" has and will continue to produce different results in different jurisdictions and thereby undermines the stated purpose of the "Preemption Order."

ARGUMENT

I.

STATE COMMISSIONS AND INDIVIDUALS WHO ACT IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF STATE COMMISSIONS ARE NOT "PERSONS" WHO ARE SUBJECT TO ENFORCEMENT PROCEEDINGS WHICH ARE INSTITUTED UNDER SECTION 401 OF THE COMMUNICATIONS ACT.

Section 401 was enacted by Congress more than 50 years ago as an original part of the Communications Act of 1934 (Act of June 19, 1934, ch. 652, Title IV, § 401, 48 Stat. 1092). With two minor exceptions which are not

relevant to the proceedings before the Court, the provisions of this Section have remained unchanged since 1934.[4]

For nearly 50 years, the enforcement provisions of this Section were never construed to apply to state commissions. Recently, however, numerous proceedings have been instituted in various federal district courts by local telephone companies seeking injunctions against certain state commissions under Section 401(b) of the Act. In a majority of jurisdictions, federal courts have found that Section 401(b) authorizes the issuance of injunctions which require state commissions to obey the FCC "Preemption Order" and to utilize that agency's prescribed depreciation practices for intrastate rate-making purposes. *E.g., South Central Bell Telephone Co. v. Louisiana Public Service Commission,* 744 F.2d 1107 (5th Cir. 1984); *Chesapeake & Potomac Telephone Co. of Maryland v. Public Service Commission of Maryland,* 748 F.2d 879 (4th Cir. 1984), *cert. granted,* 105 S. Ct. 3498 (1985); and *Mountain States Telephone & Telegraph Co. v. Department of Public Service Regulation,* 588 F. Supp. 5 (D. Mont. 1983). In reaching this conclusion, these courts were required to find, among other things, that state commissions were "persons" against whom the enforcement powers set forth in Section 401 were applicable. *Chesapeake & Potomac Telephone Co. of Maryland v. Public Service Commission of Maryland,* 748 F.2d 879 (4th Cir. 1984) *cert. granted,* 105 S. Ct. 3498 (1985); *Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission,* 565 F. Supp. 17 (W.D. Wash. 1983). *Contra, New England Telephone & Telegraph Co. v. Public Service Board of Vermont,* 576 F. Supp. 490 (D. Vt.

[4] In 1948, Section 401(c) was amended by substituting the term "United States Attorney" for "District Attorney." Act of June 25, 1948, ch. 646, § 1, 62 Stat. 909. In 1974, Section 401(d) was deleted. Act of December 21, 1974, P.L. 93-528, § 6(a), 88 Stat. 1709.

1983). For the reasons which follow, this new interpretation of the term "person" is inconsistent with the plain meaning of the language contained in the Communications Act of 1934, as well as the legislative policies which are embodied in the Act.

A. The Plain Meaning Of The Term "Person", As Defined In Section 153(i) Of The Communications Act And Used In Section 401(b), Does Not Include "State Commissions."

A review of the relevant statutory provisions demonstrates that Congress did not intend to include "state commissions" in the class of persons who are subject to enforcement proceedings under Section 401(b) of the Communications Act. In this regard, Section 401(b) provides as follows:

> (b) Orders of Commission. If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The definition of "person" is set forth in Section 153(i) of the Act, which provides "(i) 'Person' includes an individual, partnership, association, joint-stock company, trust, or corporation." The term "state commission" is separately defined in Section 153(t) as follows: "(t) 'State commission' means the commission, board, or official (by

whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." Since a determination as to whether or not state commissions are amenable to suit under Section 401(b) of the Act requires an interpretation of the word "person" as that word is used in that section, it is appropriate to briefly state the rules governing statutory construction which have been enumerated by this Court and then apply those rules to the case at bar. Under these rules, statutory construction must begin with the language of the statute itself[5] because absent a clear indication of legislative intent to the contrary, the statutory language controls its construction. *Ford Motor Credit Co. v. Cenance,* 452 U.S. 155, 158 n.3 (1981). Moreover, if the court finds the terms of a statute to be unambiguous, judicial inquiry is at an end, except "in 'rare and exceptional circumstances.'" *Rubin v. United States,* 449 U.S. 424, 430 (1981) (citation omitted).

A review of the language contained in Section 153(i) strongly supports the proposition that, as a general rule, state commissions are not to be considered "persons" for purposes of the Act. As previously stated, under Section 153(i), "'person' includes an individual, partnership, association, joint-stock company, trust, or corporation." Initially, it should be noted that Congress defined the word "person" by using the term "includes" rather than the term "means." It is well established that a term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declares what the term "means." *Sutherland Stat. Const.* § 47.07 (4th ed. 1984). In general, the word "includes" is a term of enlargement and not limitation[6] and conveys the conclusion that there are

[5] *Dawson Chemical Co. v. Rohm & Haas Co.,* 448 U.S. 176, 187 (1980); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 198-99 (1976).

[6] *United States v. Gertz,* 249 F.2d 662, 666 (9th Cir. 1957).

other items includable though not specifically enumerated by the statute. *Argosy Ltd. v. Hennigan,* 404 F.2d 14, 20 (5th Cir. 1968). As this Court noted in *Helvering v. Morgan's,* 293 U.S. 121, 125 n.1 (1934), "the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." It is not one of all-embracing definition, "but connotes simply an illustrative application of the general principle." *Federal Land Bank of St. Paul v. Bismarck Lumber Co.,* 314 U.S. 95, 100 (1934).

Although the term "person" can properly be enlarged to include entities other than those expressly mentioned in the definition, the entities so included must bear some relationship to the class established by the specific illustrations contained in the definition. If the definition is not so limited, then the decision of Congress to provide a definition would serve no purpose. It is necessary, therefore, to consider the nature of the enumerated examples to determine what characteristics define the class and whether or not the entity in question (i.e., a "state commission") possess those characteristics or is sufficiently different so as to warrant exclusion from the class.

Such an analysis demonstrates that a state commission is substantially different in nature from the entities enumerated in Section 153(i) of the Act. Each of the enumerated entities[7] are private parties presumably pursuing their private interests. State commissions, on the other hand, exercise the states' police powers which have been delegated to them by their state legislatures. Their actions are taken to further public rather than private

[7] It is interesting to compare the definition of "person" in Section 153(i) of the Act with the definition of "person" which is contained in Section 551(2) of the Administrative Procedure Act, 5 U.S.C. § 551(2). In Section 551(2), the term person "includes an individual, partnership, corporation, association, or *public or private organization* . . ." (emphasis added).

interests and their decisions are subject to judicial review.[8] Congress, in recognition of the important and unique role that state commissions would play in the regulatory scheme established by the Communications Act, has also provided a separate definition of "state commission" in Section 153. Having determined that the unique nature of a state commission required a separate definition in the Act, Congress clearly would have expressly included "state commission" in the definition of "person" if it intended the latter to encompass the former.

Finally, a review of the provisions of Section 208 of the Communications Act[9] clearly demonstrates that Congress did not consider a "state commission" to be a "person" as that term is used in the Act. This Section, which was included as a part of the 1934 Act,[10] establishes a procedure for filing complaints with the FCC and provides, in pertinent part:

> *Any person, any body politic or municipal organization, or State commission,* complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. (Emphasis added.)

[8] Moreover, since decisions of state commissions are subject to judicial review, it is unnecessary to also subject their actions to the enforcement provisions contained in Section 401. Under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2), state courts must set aside any state commission decision which is contrary to the provisions of the Communications Act. The decisions of a state's highest court are, of course, reviewable by this Court.

[9] 47 U.S.C. § 208.

[10] Communications Act of 1934, Ch. 652, Title II, § 208, 48 Stat. 1073.

It is a well-settled principle of statutory construction that a court must give effect, if possible, to every word of the statute. *Bowsher v. Merck & Co.,* 460 U.S. 824, 833 (1983) and *Fidelity Federal Savings & Loan Association v. de la Cuesta,* 458 U.S. 141, 163 (1982); a statute should not be construed in a fashion which leaves some provisions superfluous. *Bell v. New Jersey & Pennsylvania,* 461 U.S. 773, 788-89 (1983). Clearly, if Congress had intended to have the definition of the term "person" include "state commissions," it would have been unnecessary to provide in Section 208 that in addition to a "person," a "state commission" would have the right to file a complaint with the FCC. Such a construction obviously renders the language "any body politic or municipal organization, or State commission" superfluous.

B. Exclusion Of "State Commissions" From The Class Of Persons Who Are Subject To Enforcement Proceedings Under Section 401 Is Consistent With The Fundamental Congressional Policies Which Are Embodied In The Communications Act.

Although the plain meaning of the language contained in Section 153(i) clearly indicates that a "state commission" is not to be considered a "person" for purposes of enforcement proceedings instituted under Section 401, the "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry." *Watt v. Alaska,* 451 U.S. 259, 266 (1981). For example, when the plain meaning of the statutory language produces absurd or unreasonable results which are plainly at variance with the policy of the legislation as a whole, courts will give effect to the legislative policy and not to the literal meaning of the words. *United States v. American Trucking Associations,* 310 U.S. 534, 543 (1940); *Ozawa v. United*

States, 260 U.S. 178, 194 (1922). The plain meaning rule is "rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928). Moreover, this Court has noted that "'[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy,'" *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18 (1981) (Citation omitted.)[11] Nevertheless, in the absence of a clearly expressed legislative intent to the contrary, the language must ordinarily be regarded as conclusive. *United States v. Turkette*, 452 U.S. 576, 580 (1981).

Rather than detract from or contradict the plain meaning of the statute, a review of the various provisions of the Communications Act, as well as the policies embodied in those provisions, provides further support for the conclusion that Congress did not intend to include state commissions within the class of persons who are subject to the enforcement actions instituted under Section 401. In this regard, it should first be noted that under Section 152(a), the provisions of the Communications Act were expressly made applicable only to a specific class of "persons", i.e., those "persons engaged within the United States in such communications [i.e., interstate communications by wire or radio] or such transmission of energy by radio." 47 U.S.C. § 152(a). By concluding that a state commission is subject to enforcement proceedings instituted under Section 401(b), the Court below, in effect, is making the provisions of the Act applicable to entities

[11] This general policy of reviewing the provisions of the whole law in order to ascertain the meaning of one part of that law has been made specifically applicable to the construction of the Communications Act. *United States v. Storer Broadcasting Co.* 351 U.S. 192, 203 (1956).

other than those "engaged in communications by wire or radio."

In addition to limiting the applicability of the Act to a certain class (i.e., persons engaged in communications by wire or radio), Congress also limited the subject matter of the FCC's jurisdiction. For example, Section 151 of the Act provides that the FCC was created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio . . .," while Section 152(a) states that the provisions of the Act "shall apply to all interstate and foreign communication by wire or radio. . . ."

Although this language may appear to be sufficient to establish that Congress intended to exclude intrastate communications from the FCC's jurisdiction, in view of this Court's decision in the *Shreveport* rate cases,[12] a more explicit limitation was placed in the Act.[13] By expressly preserving the authority of states to regulate rates and charges incident to intrastate communications service,[14] it is apparent that Congress intended to establish a dual system of regulation as a fundamental part of the Communications Act. Although the jurisdictional boundary between state and federal regulatory authority is not always subject to precise location, there unquestionably exists two separate and distinct areas of regulatory authority. Under this system, communications are to be jointly regulated by the FCC and the various state commissions, and neither is subject to the regulatory authority of the other within these respective areas of authority. This view of the Communications Act (i.e., the

[12] *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914).

[13] *See, e.g.*, 78 Cong. Rec. 8823 (1934); Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce, 73d Cong., 2d Sess. 154 (1934).

[14] See 47 U.S.C. §§ 151(b) and 221(b).

establishment of a dual system of regulation) is consistent with a definition of "person" for the purposes of Section 401 which excludes state commissions; rather than subject state commissions to FCC control, the Act divides regulatory responsibility among these entities and only authorizes the FCC to act within its area of responsibility without interfering with the states' regulation of intrastate commmunications.

The importance of state commissions in this dual regulatory system and the deference accorded to these agencies by Congress are further established by a consideration of the numerous references to these entities which are contained in the Act. For example, Section 213 of the Act, which permits the FCC to make a valuation of the property of a carrier, expressly provides that "[n]othing in this section shall impair or diminish the powers of any State commission." 47 U.S.C. § 213(h). Moreover, under Section 220(j), the FCC is directed to investigate and report to Congress as to the need for legislation "to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates." (i.e., accounts and records including accounting practices relating to depreciation charges). 47 U.S.C. § 220(j). Such a requirement is, of course, indicative of an intention to establish two equal and independent regulatory authorities and to have jurisdictional disputes resolved by Congress, not by the FCC. Finally, in order to facilitate cooperation between these independent regulatory authorities and to permit state participation in the FCC's decision-making process, Section 410(a) authorizes the FCC to refer any matter arising in its administration of the Act to a federal/state joint board. 47 U.S.C. § 410(a).

C. Inclusion Of "State Commissions" In The Class Of Persons Who Are Subject To Enforcement Proceedings Under Section 401 Will Permit Federal Courts To Interfere In Intrastate Rate Making, An Area Traditionally Reserved To The States.

It is apparent that the enlargement of the scope of the definition of the word "person" to include "state commission" will permit federal courts to intervene in matters which have traditionally been left to state regulation, i.e., the establishment of rates for local utility service. Consequently, the construction of Section 153(i) and Section 401 "implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government." *Palmer v. Massachusetts,* 308 U.S. 79, 84 (1939). In previous cases involving questions of statutory construction, "this Court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportatic to the plain mandate of Congress." *Id.*[15] Not only has Congress failed to explicitly make state commissions subject to the enforcement provisions of Section 401(b), but to do so would clearly require judicial expansion of the definition of "person" that reaches far beyond the language which is contained in Section 153(i). *New England Telephone & Telegraph Co. v. Public Service Board of Vermont,* 576 F. Supp. 490, 494 (D. Vt. 1983). Given the consequences that such an expansive interpretation would have in an area which has traditionally been reserved to the states (i.e., intrastate

[15] *See also FTC v. Bunte Brothers,* 312 U.S. 349, 351 (1941) (the reach of Section 5 of the Federal Trade Act is not to be extended beyond the plain meaning of the language which was used by Congress unless the purpose of the Act would be defeated) and *A. B. Kirschbaum Co. v. Walling,* 316 U.S. 517, 521-22 (1942) (when the federal government takes over local functions and thereby radically readjusts to the balance of state and national authority, legislators have a duty to be explicit and not rely on a retrospective expansion of the meaning by the judiciary).

reserved to the states (i.e., intrastate rate making), the Court should limit the scope of the definition to the plain meaning of the language which was used by Congress.

It also should be noted that the inapplicability of the enforcement provisions of Section 401 to state commissions is consistent with a well-established Congressional policy to keep issues relating to intrastate rate making out of federal courts, where there is an adequate remedy in the state court system. In this regard, the Johnson Act (28 U.S.C. § 1342) prohibits, under certain circumstances, the issuance of federal injunctions with respect to intrastate utility rates. As the Court noted in *Tennyson v. Gas Service Co.*, 506 F.2d 1135 (10th Cir. 1974): "[b]ehind the Act were years of hostilities generated from jurisdiction in both the state and federal systems, removal of which was deemed desirable to the national policy. Thus the restriction imposed was far-reaching, going to jurisdiction itself." *Id.* at 1138. (Citation omitted).

Moreover, even when the Johnson Act is technically not applicable, the policy against federal court interference in intrastate rate making may require federal abstention when there is an adequate state court remedy. *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 349-50 (1951). This policy is also a fundamental principle which is embodied in various provisions of the Communications Act, including that provision which excludes "state commissions" from the definition of "person."

D. The Exclusion Of "State Commissions" From The Class Of Persons Who Are Subject To Enforcement Proceedings Under Section 401 Necessarily Implies A Similar Exclusion For The Members Of Those Bodies.

It has also been argued that even if a "state commission" is not a "person" for purposes of enforcement

proceedings under Section 401(b), the "individuals" who comprise those commissions are included in the definition of that term. Since individual commissioners were also named as defendants in the various suits which were filed, the District Court could issue the injunctions under Section 401(b) against these "persons." *Chesapeake & Potomac Telephone Co. of Maryland v. Public Service Commission of Maryland*, 748 F.2d 879, 881 (4th Cir. 1984), *cert. granted*, 105 S. Ct. 3498 (1985).

With respect to this argument it is sufficient to state that since Congress clearly intended to exclude "state commissions" from the definition of "person," the term "individual," which is referred to in Section 153(i), must be construed in such a way as to exclude members of state commissions when they act in their official capacities as state commissioners. Such a construction is required in order to harmonize the various parts of the statute and to give effect to the fundamental Congressional policies which are embodied in the Act.

II.

THE "PREEMPTION ORDER" IS NOT AN ADJUDICATORY ORDER SUBJECT TO ENFORCEMENT BY A PRIVATE PARTY UNDER SECTION 401(b) OF THE COMMUNICATIONS ACT.

Even if state commissions are considered to be "persons" who are subject to enforcement proceedings under Section 401 of the Communications Act, the FCC's "Preemption Order" is not an "order" which can be enforced by a federal court on behalf of a private party under Section 401(b) of the Act. As the First Circuit noted in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 4, 8-9 (1st Cir. 1984), the FCC's "Preemption Order" is, in fact, the product of a rule-making and is not an order. Since only an order entered in an adjudicatory proceeding is enforceable under Section

401(b), the District Court was without authority to issue an injunction to require obedience to the FCC's "Preemption Order." *Id.* at 4-7. Although a contrary conclusion has been reached by the Fourth, Fifth and Eighth Circuits,[16] the findings of the First Circuit should be adopted since they are in accord with the enforcement scheme which was established by Congress and further the Congressional policies which underlie the various provisions of the Communications Act.

A. The FCC's "Preemption Order" Is The Product Of A Rulemaking And Is Not An Order Which Was Entered In An Adjudicatory Proceeding.

It is apparent that there exists a clear distinction between the rules which are promulgated by the FCC and the orders which are rendered by that agency. In this regard, Section 154(i) of the Act provides that: "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions." If "rules" and "orders" were considered to be synonymous, it would have been unnecessary for Congress to separately identify "rules" and "orders" in this Section. Moreover, although the Communications Act does not specifically define "orders" and "rules and regulations," this Court has distinguished them as follows:

> Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. *Columbia Broadcasting System v. United States,* 316 U.S. 407, 418 (1942).

[16] *Chesapeake & Potomac Telephone Co. of Maryland v. Public Service Commission of Maryland,* 748 F.2d 879 (4th Cir. 1984), *cert. granted,* 105 S. Ct. 3498 (1985); *South Central Bell Telephone Co. v. Louisiana Public Service Commission,* 744 F.2d 1107 (5th Cir. 1984); and *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission,* 738 F.2d 901 (8th Cir. 1984).

Consequently, FCC rules apply to all persons (including non-parties), set a standard of conduct, and are not self-executing. It is through the valid exercise of its rule-making power that the FCC makes new law,[17] thereby "filling in the interstices . . ." of the statute. *Securities & Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 202 (1947). FCC orders, on the other hand, adjudicate the rights of individuals and are only binding on the parties to the adjudication.

Further guidance as to what constitutes an agency "rule" and what constitutes an agency "order" is supplied by certain provisions of the Administrative Procedure Act ("APA")[18] 5 U.S.C. §§ 551, *et seq.* The APA defines a rule as "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4). The APA also defines the word "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rule making.* . . ." 5 U.S.C. § 551(6) (emphasis added). From the foregoing, it is clear that not only is there a distinction between "orders" and "rules," but an agency action which contains a statement of general applicability and future effect and which interprets the law or prescribes policy is to be considered a rule and not an order.

[17] *FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134, 202-03 (1940).

[18] Although the APA was enacted subsequent to the enactment of the Communications Act of 1934 and its definitions

Accordingly, in determining whether or not the FCC's "Preemption Order" is enforceable by a private party under Section 401(b) of the Act, it is important to first establish the nature of the action which was taken by the FCC (i.e., did it promulgate a rule or issue an order). Although the FCC has labeled its action a "Memorandum Opinion and *Order*," "[t]he particular label placed upon [a decision] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do, and has done which is decisive." *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416 (1942). It is particularly important to disregard the labels which the FCC attaches to its actions since that agency commonly adopts "rules" in opinions it calls "orders." *See, e.g.*, 47 C.F.R. § 1.429(i). A consideration of the context in which the FCC decision was made as well as an analysis of the substance of what the FCC purported to do firmly establishes that the "Preemption Order" is the product of a rulemaking and does not constitute an order of that agency.

Initially, it should be noted that the "Preemption Order" was issued in an FCC rulemaking proceeding. That proceeding was originally instituted for the purpose of determining whether or not certain telephone assets should be expensed or depreciated and was docketed as *In Re Amendment of Part 31, Uniform System of Accounts, etc.*, Docket No. CC 79-105. However, the proceeding was subsequently expanded to include consideration of a Petition for Declaratory Ruling that requested the FCC to preempt an order of the Ohio PUC which denied GTE of

only apply to the APA, the Act was the product of extensive study of pre-existing procedure and some of its provisions were largely declaratory of existing law. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 5 (1st Cir. 1984). Accordingly, reference to the APA's definitions appropriately can be used in determining the proper construction of pre-existing related procedural statutes such as Section 401(b) of the Communications Act of 1934.

Ohio the same depreciation rates for intrastate rate-making purposes as had been prescribed by the FCC.

While it is apparent that the FCC conducted a rulemaking proceeding in *Amendment of Part 31*, it could be argued that in response to the Petition for Declaratory Ruling, the FCC conducted an "adjudicatory proceeding" which led to the issuance of a "declaratory order." With respect to this argument, it is sufficient to state that the "declaratory ruling" proceedings were conducted in the same manner as the rulemaking in *Amendment of Part 31*. There is absolutely no indication that either proceeding was conducted as an adjudication. Moreover, to the extent that the FCC conducted an adjudicatory proceeding on the Petition for Declaratory Ruling, the results of that adjudication would only be binding on the parties to that proceeding and perhaps on the parties in *Amendment of Part 31*. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418 (1942). As previously stated, the Md. PSC was not a party to either the declaratory ruling proceeding or to the proceedings which were conducted on a consolidated basis with *Amendment of Part 31*.

A review of the various provisions of the FCC's "Memorandum Opinion and Order" indicates that that Order merely purports to interpret the law (i.e., Section 220(b) automatically preempts inconsistent state depreciation practices);[19] to implement agency policy (i.e., even if Section 220(b) does not automatically preempt inconsistent state practices, such practices will be preempted by the FCC since they frustrate vital national policies);[20] and to establish a standard of conduct for the future (i.e., FCC depreciation prescriptions are to be followed in federal and state jurisdictions unless the FCC provides otherwise).[21] This decision does not and cannot adjudicate the rights of

[19] Pet. App. 56a.

[20] Pet. App. 60a.

[21] Pet. App. 48a.

the Md. PSC, nor does it order the Md. PSC to take any specific action; the ordering paragraphs of the FCC's "Preemption Order" merely grant the Petition for Reconsideration which was filed by AT&T and the Petition for Declaratory Ruling which was filed by General Telephone Company of Ohio, as well as direct the FCC's Secretary to publish the Order in the *Federal Register* and to serve a copy of the Order on each state commission (Pet. App. 62a).

Finally, certain statements which were made by the FCC concerning the purpose of its "Preemption Order" are particularly helpful in ascertaining the nature of that decision. In this regard, the FCC stated in response to an argument that its ruling was premature:[22]

> We do not agree since the purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists. A case or controversy in the judicial sense is not required. In this case, it appears necessary to issue such a ruling to clarify for the state commissions and the carriers the effect of our depreciation prescriptions (Citation omitted.) (Pet. App. 60a).

Accordingly, the stated purpose of the "Preemption Order" was to provide "guidance" to state commissions by clarifying the effect of the FCC's depreciation prescriptions. This is clearly an attribute of a rule or regulation and not an order. 5 U.S.C. §§ 551(4) and (6). The "Preemption Order" was not an attempt to determine, in an adjudicatory proceeding, whether or not any state commission had committed a specific violation of either the Communications Act, or any FCC rules or policies. Moreover, since a "case or controversy" was not before the FCC, such an adjudication could not be made by that agency.

[22] The Ohio PUC had argued that since its rate order was subject to reconsideration at the request of GTE of Ohio, the FCC should delay issuing a declaratory ruling. (Pet. App. 60a.).

For the foregoing reasons, the Court should find that the First Circuit was correct in its determination that the "Preemption Order" was the product of an FCC rulemaking and not an adjudicatory order.

B. FCC Rulemaking Orders, Such As The "Preemption Order," Cannot Be Enforced By Private Parties Under The Provisions Of Section 401(b) Of The Communications Act.

Since the FCC's "Preemption Order" was not an adjudicatory order but rather a product of a rulemaking proceeding, this decision cannot be enforced by a federal court on behalf of a private party under Section 401(b) of the Communications Act. The "Preemption Order" is not enforceable under Section 401(b) because that Section only authorizes federal courts to enforce FCC "orders" that are entered in adjudicatory proceedings and not FCC decisions that are a product of a rulemaking. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 742 F.2d 1, 4-7 (1st Cir. 1984).

1. *The Plain Meaning Of The Language Which Is Used In Section 401(b) Indicates That Only FCC "Orders" And Not Decisions Which Are The Product Of A Rulemaking Can Be Enforced Under That Section.*

In determining the types of actions which can be enforced under Section 401(b), it is appropriate to begin with an analysis of the language which was used by Congress in this Section. As previously mentioned, there is a recognition in various parts of the Communications Act that the term "order" does not encompass "rules or regulations." *E.g.,* 47 U.S.C. § 154(i). Accordingly, since the language contained in Section 401(b) only refers to the enforcement of FCC "orders," it is reasonable to assume that Congress did not intend to provide an enforcement

mechanism in this Section for other types of FCC actions. Moreover, the use of words such as "obey" and "disobedience" rather than "violation" and "comply" also indicates that Section 401(b) was intended only to provide a means of enforcing self-executing directives. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 565 F. Supp. 949, 957-58 (D. Me. 1983). It does not provide a means of enforcing compliance with FCC rules or preventing a violation of the Act. As will be demonstrated in the following section of this Brief, other provisions of the Act have been enacted for that purpose.

There are numerous references to FCC orders in various provisions of the Communications Act. However, in only one provision, Section 402(a),[23] has the term "order" been construed to encompass FCC rules and regulations, as well as orders entered in adjudicatory proceedings. In this regard, Section 402(a), which provides for judicial review of FCC actions, states:

> Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq.].

In the proceedings below, the Fourth Circuit held that since the FCC's "Preemption Order" was considered an "order" for purposes of judicial review under Section 402 of the Act,[24] it must also be considered an "order" for purposes of instituting a private enforcement action under Section 401(b). *Chesapeake & Potomac Telephone Co. of Maryland v. Public Service Commission of Maryland,* 748

[23] 47 U.S.C. § 402(a).

[24] In *Columbia Broadcasting System v. United States,* 316 U.S. 407 (1942), this Court determined that the word "order" as it was used in Section 402 encompassed FCC rules.

F.2d 879, 881 (4th Cir. 1984), *cert. granted,* 105 S. Ct. 3498 (1985). *Contra, New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 742 F.2d 1, 7-8 (1st Cir. 1984). In support of this conclusion, it has been argued that under established principles of statutory construction, identical words used in different parts of the same act are presumed to have the same meaning. *Atlantic Cleaners & Dyers v. United States,* 286 U.S. 427, 433 (1931).

However, this Court has also stated that "the presumption is not rigid" and that the same word may have different meanings in different parts of a statute, "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, . . ." *Id.* at 433. In view of the different subject matter contained in these two sections of the Act and the different Congressional policies embodied in those two sections, the word "order" should not be found to have the same meaning in both sections.

As previously mentioned, in *Columbia Broadcasting System v. United States,* 316 U.S. 407 (1942), the Court was construing the term "order" for purposes of determining whether FCC rules were subject to judicial review. In making such determinations, this Court has stated that there is a "basic presumption of judicial review to one 'suffering legal wrong of agency action, . . .'" and that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967) (Citation omitted.) These policies required a broad interpretation of the word "order" in *Columbia Broadcasting System v. United States,* 316 U.S. 407 (1942) because, as the Court noted:

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, . . . *Id.* at 425.

Given the "exceptional" nature of the case which was before the Court[25] and the fact that CBS clearly suffered irreparable harm as a result of the promulgation of the FCC's "policy statement," the Court concluded that the rules in question were subject to review under Section 402.

These policy considerations, which underlie the Court's broad construction of the word "order" as it appears in Section 402, are obviously not involved in the construction of that word as it is used in Section 401(b). More importantly, such a broad construction would be contrary to the language which was used by Congress, the enforcement scheme which is contained in Section 401, and certain fundamental policies which are embodied in the Act. For these reasons, the desirability of maintaining linguistic uniformity among different sections of the Act is not controlling in this case.[26]

[25] *Columbia Broadcasting System v. United States,* 316 U.S. 407 (1942) concerned the FCC's General Broadcasting Regulations which told broadcasting stations in part how they were to deal with the networks. If CBS had to wait until the regulations were enforced to secure judicial review of their validity, it might have to wait forever, since the stations intended to obey the regulations to CBS' detriment. *Id.* at 423-424.

[26] It has also been asserted that this Court's decision in *Ambassador, Inc. v. United States,* 325 U.S. 317 (1945) governs the construction of the word "order" in this proceeding. Although the Court did not identify the specific subsection of Section 401 which authorized the issuance of an injunction against certain hotel owners, it found jurisdiction because "a departure" from an FCC approved tariff "is forbidden by the Act," *Id.* at 325, thus bringing the suit within the terms of Section 401(a). Moreover, it is apparent that the suit was brought by the United States on behalf of the FCC, and not by a private party under Section 401(b).

2. *Under The Enforcement Scheme Established In Section 401 Of The Act, Only Adjudicatory Orders Can Be Enforced On Behalf Of Private Parties Under Section 401(b).*

The conclusion that only orders which are entered in adjudicatory proceedings can be enforced under Section 401(b) is further supported by a consideration of the enforcement provisions which are contained in Section 401(a) of the Act. 47 U.S.C. § 401(a). This Section states that:

> [t]he district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

Therefore, while the FCC, the United States, or a private person can obtain an injunction under Section 401(b) requiring a person to obey an FCC order, only the FCC can request a federal court, pursuant to Section 401(a), to enjoin "a failure to comply with or a violation of any of the provisions" of the Act; it has the sole responsibility for determining where and how to enforce the Act. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 742 F.2d 1, 5 (1st Cir. 1984); *Massachusetts Universalist Convention v. Hildreth & Rogers Co.,* 183 F.2d 497, 500 (1st Cir. 1950).

Since rules and regulations are general in form, highly general in content,[27] and "frequently either interpret or

[27] *Columbia Broadcasting System v. United States,* 316 U.S. 407, 418 (1942).

merely parrot legislation,"[28] the enforcement of FCC "rules and regulations" in effect constitutes enforcement of the Act itself. In essence, rules and regulations constitute a source of law which the Commission and the courts must enforce. *Batterton v. Francis,* 432 U.S. 416, 425-26 (1977). Therefore, to construe the term "order" as it appears in Section 401(b) to include FCC "rules and regulations" would permit private parties to enforce compliance with the Act. As the Court noted in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 742 F.2d 1, 5 (1st Cir. 1984):

> Section 401(b) is consistent with the Commission's prerogatives under section 401(a) only if the term "order" is read to apply exclusively to those cases in which the Commission has previously considered and determined the specific rights and duties in question and where the private action seeks only to enforce the Commission's specific mandate. Only then would the Commission retain enforcement initiative, selecting a particular target for regulatory action and specifying the regulatory constraints that are to govern the target.

By limiting the applicability of Section 401(b) to orders entered in an adjudicatory proceeding, Congress has insured that only the FCC can enforce the Act, either by instituting a proceeding pursuant to Section 401(a) or by determining through an adjudication that a person has committed a specific violation of the Act or its regulations.

In recognition of the fact that the purpose of the Act "was to protect the public interest in communications,"[29] and the fact that "the focus of the Act is on the general public with the FCC, not the private litigant, as its champion,"[30] courts have historically declined to enforce

[28] *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 565 F. Supp. 949, 956 (D. Me. 1983).

[29] *Scripps-Howard Radio v. FCC,* 316 U.S. 4, 14 (1942).

[30] *Lechtner v. Brownyard,* 679 F.2d 322, 327 (3rd Cir. 1982).

FCC rules and regulations on behalf of private litigants. For example, in *Comtronics, Inc. v. Puerto Rico Telephone Co.,* 409 F. Supp. 800 (D. P.R. 1975), *aff'd on other grounds,* 553 F.2d 701 (1st Cir. 1977), the plaintiff sought injunctive relief alleging, *inter alia,* that the defendant had violated the FCC's "holdings, rulings and policies," *Id.* at 814. In dismissing the action for lack of jurisdiction, the court noted that "[o]nly under section 402(b) (sic) could a subscriber apply to this Court, and then only to obtain enforcement of an *order* of the FCC, other than for the payment of money." *Id.* at 817. (Emphasis in text.) *See also Kroeger v. Stahl,* 148 F. Supp. 403, 405-06 (D. N.J. 1957), *aff'd* 248 F.2d 121 (3rd Cir. 1957). A broad interpretation of the term "order" which includes "rules and regulations" would have the undesirable effect of creating a private cause of action under the Communications Act, which is contrary to Congress' intent to have the FCC, and not private litigants, enforce the Communications Act.

That FCC rules, regulations and declaratory rulings may not be enforced under Section 401(b) is further supported by cases interpreting 49 U.S.C. § 16(12), a provision of the Interstate Commerce Act.[31] For example, in *McFaddin Express v. Adley Corp.,* 346 F.2d 424, 426 (2d Cir. 1965), *cert. denied* 382 U.S. 1026 (1966), the ICC "ordered" that an application to permit a management takeover be granted, and "authorized" the same to be done in accordance with a contract executed by the parties and filed therewith. The Court of Appeals for the Second Circuit held that a violation of the contract did not constitute disobedience of an "express command of the ICC" and therefore no cause of action existed under

[31] The relevance of cases construing § 16(12) is established by examination of the House Report on the Communications Act of 1934, which states that "Section 401(a-c) is based on Sections 20(a), 16(12) and 12(1) of the Interstate Commerce Act." H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934).

Section 16(12). In *Farmer's Loan & Trust Co. v. Northern Pacific Railway Co.,* 83 F. 249, 268 (D. Wash. 1897), the Court held that "a mere general declaration of the duty of the defendant corporations, as defined in the law itself" was not a "definite order of the [ICC] which can be enforced by a decree of this court" under Section 16(12). Finally, in its discussion of Section 16(12), this Court observed that "[i]n common acceptation a suit to enforce an order of the [ICC] is one which seeks to compel *the carrier to whom the order is directed* to yield obedience to its command." *Illinois Central Railroad Co. v. Public Utilities Commission of Illinois,* 245 U.S. 493, 502 (1918) (emphasis added).

Thus, cases construing Section 16(12) indicate that "order" under Section 401(b) refers to an express command issued by the FCC to a party to an adjudicatory proceeding. It does not apply to FCC rules, regulations or declaratory rulings, such as the "Preemption Order," which merely state the FCC's interpretation of law and set a standard of conduct.

3. *If The Communications Act Authorizes The FCC To Preempt Inconsistent State Depreciation Practices, Then The Act Also Requires The FCC, Rather Than Private Parties, To Enforce The "Preemption Order."*

It has been argued that one of the purposes underlying the enactment of the Communications Act was to promote uniformity and consistency in interstate communications policy and to centralize the development of such policy in one expert agency. If it is determined that this policy permits the FCC to preempt inconsistent state depreciation practices, then this policy also requires the FCC, and not private litigants, to enforce the "Preemption Order." Uniformity and consistency can only be achieved if the term "order," as it appears in Section 401(b), is narrowly

construed so as to only permit private party enforcement of self-executing orders which are entered by the FCC in adjudicatory proceedings. Private enforcement of FCC "rules and regulations," such as the "Preemption Order," will threaten the very policy which is claimed to justify the FCC's preemption of inconsistent state depreciation practices.

As previously stated, rules, regulations and declaratory rulings, which merely purport to interpret the law, are highly general in content, form and applicability. *Columbia Broadcasting System v. United States,* 316 U.S. 407, 418 (1942). Therefore, the application of rules, regulations, or declaratory rulings in a particular case often requires not only adjudicatory fact-finding but a determination of the scope and meaning of the agency's pronouncements. *Gardner v. Toilet Goods Association,* 387 U.S. 167, 193-98 (Fortas, J., dissenting) (1967); *Board of Trade v. Commodity Futures Trading Commission,* 704 F.2d 929, 932-33 (7th Cir. 1983). Given the fact that additional proceedings are required in order to ascertain whether or not a person is in compliance with FCC rules, regulations, or declaratory rulings, the question becomes whether, under the Communications Act, those proceedings must directly involve the FCC.

The enforcement proceedings which have been instituted under Section 401(b) with respect to the FCC's "Preemption Order" illustrate very well the need to narrowly construe the term "order" as it appears in that Section, and to initially require the FCC to determine whether or not a state commission is in violation of that "order." For example, in a case which was instituted by South Central Bell Telephone Company against the Louisiana Public Service Commission, the District Court concluded that the prerequisites for enforcement under Section 401(b) had been met and directed the Louisiana Commission to comply with the FCC's order by setting

new rates for intrastate service within ten days. *South Central Bell Telephone Co. v. Louisiana Public Service Commission,* 570 F. Supp. 227, 232-34 (M.D. La. 1983), *aff'd,* 744 F.2d 1107 (5th Cir. 1984).

In response to the Court's preliminary injunction, the Louisiana Commission issued an order setting new rates. In this order, the Louisiana Commission found that the application of the FCC's prescribed accounting methods resulted in an increased expense level of $40,506,000. However, after reducing the rate of return from 13.5 percent to 12 percent, the Louisiana Commission also found that an increase in revenue of only $1,270,000 was needed to meet those increased costs.[32]

Thereafter, South Central Bell filed a motion in District Court seeking to modify the preliminary injunction on the basis that the Louisiana Commission's subsequent order was not in compliance with the FCC's "Preemption Order." In response to this motion, the District Court found that "that Commission had absolutely no justification for failing to order an increase in revenues sufficient to cover the increased operating costs of the company." *South Central Bell Telephone Co. v. Louisiana Public Service Commission. Id.* at 237. The District Court stated: "Adjusting fair return on equity downward, in the absence of evidence justifying such an adjustment, was arbitrary and capricious — a simple exercise in arithmetic designed to minimize the increase in telephone rates." *Id.* at 237-38. The Court required the Commission to increase intrastate rates by $40,506,000 and this order was subsequently affirmed by the Court of Appeals. *South Central Bell Telephone Co. v. Louisiana Public Service Commission,* 744 F.2d 1107 (5th Cir. 1984).

[32] The procedural history of this case which followed the issuance of the preliminary injunction is discussed in *South Central Bell Telephone Co. v. Louisiana Public Service Commission,* 744 F.2d 1107, 1112-14 (5th Cir. 1984).

This decision of the Louisiana District Court should be compared with the action which was taken by the District Court in Maine under nearly identical circumstances. In that case, the District Court issued a preliminary injunction requiring the Maine Public Utilities Commission to comply with the FCC's prescribed depreciation rates for intrastate rate-making purposes. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 570 F. Supp. 1558, 1582-83 (D. Me. 1983), *rev'd,* 742 F.2d 1 (1st Cir. 1984).

Following the issuance of an order by the Maine Commission, which authorized a rate increase of $833,000 rather than the $1,667,000 rate increase which was sought by the telephone company, the telephone company filed a motion with the District Court in which it maintained that the Maine Commission had failed to comply with the terms of the preliminary injunction. In this regard, the company contended that the Commission had improperly reduced its return on equity and adopted a rate design which would allegedly prevent the company from recovering the full amount of the additional revenues.

After reviewing the evidence on the record, the Court found that the reduction in the return on equity was not unreasonable and that "[t]he rate design chosen by the PUC is neither unreasonable nor unsupported by the evidence." *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 579 F. Supp. 1356, 1362 (1984). Accordingly, it concluded that the Maine Commission's rate order was in compliance with the terms of the preliminary injunction.

Similarly, in a case which was instituted in Kentucky, a federal District Court was required to review a state commission rate-making order to determine whether or not that order was in compliance with the FCC's "Preemption Order." *South Central Bell Telephone Co. v.*

Kentucky Public Service Commission, Civil Action No. 85-02 (E.D. Ky. 1985). In its rate order, the Kentucky Commission expressly ruled that the telephone company could begin recognizing the higher FCC-prescribed depreciation rates as soon as those rates were finally approved by the FCC. However, it denied any additional rate increase because the telephone company had failed to establish the higher depreciation expense would result in an inability to achieve the previously approved 11.475 percent rate of return. In view of the telephone company's allegation that the rate-making methodology which was used by the Kentucky Commission "fails to provide the revenues necessary to recover this added depreciation expense and satisfy the authorized rate of return on investment," the District Court denied the Kentucky Commission's motion for summary judgment. *Id.* at 9. The issue as to whether the Kentucky Commission was in compliance with the "Preemption Order" would be subject to further litigation in the District Court. *Id.* at 10.

From the foregoing, it is apparent that in view of the fact that rate making is a complex function and involves consideration of numerous interdependent factors, enforcement of the "Preemption Order" requires a detailed analysis of the rate-making process to determine whether a state commission has complied with that "Order." In effect, a broad construction of the term "order," so as to include the "Preemption Order," makes state rate-making decisions subject to judicial review in the various federal district courts. Not only is the federal court system ill-equipped to perform such a task, but such a result undermines the Congressional policy which is embodied in the Johnson Act and deprives the FCC of the opportunity to determine for itself whether the state commission's rate decision is contrary to either the Communications Act or the policies that it has adopted under the Act. Moreover, since state commission rate orders are reviewable in the

state court system, the availability of Section 401(b) to enforce the FCC's "Preemption Order" will result in issue-splitting and unnecessary procedural complexity; depreciation issues will be considered in federal district court, while state courts will review all other related issues. Finally, if the goal of promoting the development of a uniform, nationwide interstate communications policy permits the FCC to preempt the use of inconsistent depreciation practices for intrastate rate-making purposes, then that goal also dictates that Section 401(b) not be made available to private parties to enforce the FCC's "Preemption Order." The different decisions which were rendered in Louisiana and Maine clearly demonstrate that the use of such an enforcement procedure will not produce a uniform, nationwide policy.

It may be argued that the FCC does not have the resources to enforce its "Preemption Order" in 50 jurisdictions and, therefore, must rely on private parties to enforce that ruling. However, Congress has determined that the FCC, and not private parties, is to enforce the Communications Act. *Lechtner v. Brownyard,* 679 F.2d 322, 327 (3d Cir. 1982); *Massachusetts Universalist Convention v. Hildreth & Rogers Co.,* 183 F.2d 497, 500 (1st Cir. 1950). If the FCC is correct in its assertion that Section 220(b) and FCC policies preempt inconsistent state depreciation practices, it is charged with the responsibility of determining whether or not specific rate orders are in compliance with the Act and/or the agency's policies. Such a determination can be made in the context of an FCC adjudicatory proceeding or prior to the institution of enforcement proceedings by the FCC under Section 401(a). The FCC cannot, however, abdicate its responsibilities under the Communications Act in favor of private party enforcement under Section 401(b).

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded with directions to enter a judgment in favor of the Petitioner and to vacate the preliminary injunction which was issued by the District Court.

Respectfully submitted,

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

I. United States Code

5 U.S.C. § 551 provides in pertinent part:

§ 551. Definitions

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

28 U.S.C. § 1342 provides in pertinent part:

§ 1342. Rate orders of State agencies

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and

(2) The order does not interfere with interstate commerce; and

(3) The order has been made after reasonable notice and hearing; and

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

47 U.S.C. § 151 provides in pertinent part:

§ 151. Purposes; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. § 152 provides in pertinent part:

§ 152. Application

(a) The provisions of this Act shall apply to all interstate and foreign communications by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmis-

sion of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; . . .

(b) Except as provided in section 224 [47 USCS § 224] and subject to the provisions of section 301 [47 USCS § 301] and Title VI [47 USCS § 521 et seq.], nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, . . .

47 U.S.C. § 153 provides in pertinent part:

§ 153. Definitions

(i) "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation.

(t) "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

47 U.S.C. § 154 provides in pertinent part:

§ 154. Federal Communications Commission

(i) Duties and powers. The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

47 U.S.C. § 208 provides:

§ 208. Complaints to Commission; investigations

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. * * *

47 U.S.C. § 213 provides in pertinent part:

§ 213. Valuation of property of carrier

(h) State commissions. Nothing in this section shall impair or diminish the powers of any State commission.

47 U.S.C. § 220 provides in pertinent part:

§ 220. Accounts, records, and memoranda

(b) Depreciation charges. The Commission shall, as soon as practicable, prescribe for such carriers the clasess of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the clasess [classes] of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other

charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(j) Report to Congress on need for further legislation. The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

47 U.S.C. § 221 provides in pertinent part:

§ 221. Consolidations and mergers of telephone companies

(b) State jurisdiction over services. Subject to the provisions of section 301 [47 USCS § 301], nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

47 U.S.C. § 401 provides:

§ 401. Enforcement provisions.

(a) Jurisdiction. The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) Orders of Commission. If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Duty to prosecute. Upon the request of the Commission it shall be the duty of any district attorney [United States attorney] of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

47 U.S.C. § 402 provides in pertinent part:

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure. Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq.].

47 U.S.C. § 410 provides in pertinent part:

§ 410. Joint boards and commissions

(a) State joint boards; reference of communication matters; composition; jurisdiction, powers, duties, and obligations; conduct of proceedings; force and effect of joint board action; members: nomination, appointment, and rejection; allowances for expenses. Except as provided in section 409 [47 USCS § 409], the Commission may refer any matter arising in the administration of this Act to a joint board to be composed of a member, or of an equal number of members, as determined by the Commission, from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed. For purposes of acting upon such matter any such board shall have all the jurisdiction and powers conferred by law upon an examiner [administrative law judge] provided for in section 11 of the Administrative Procedure Act, designated by the Commission, and shall be subject to the same duties and obligations. The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The joint board member or members for each State shall be nominated by the State commission of the State or by the Governor if there is no State commission, and appointed by the Federal Communications Commission. The Commission shall have discretion to reject any nominee. Joint board members shall receive such allowances for expenses as the Commission shall provide.

49 U.S.C. § 16(12) provides as follows:

§ 16, par. (12). Proceedings to Enforce Orders Other Than for Payment of Money. If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured

thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same. Repealed by Act Oct. 17, 1978, P. L. 95-473, § 4(b), 92 Stat. 1466.

II. Annotated Code of Maryland

Article 78

Md. Ann. Code art. 78, § 68 provides in pertinent part:

§ 68. General power of Commission; telephone company charges for directory assistance; charges based on measured time period unit rate for local messages.

(a) The Commission shall have the power to determine just and reasonable rates of public service companies, whether as maximum, minimum or maximum and minimum, respectively. The rates so determined shall be fixed by order to be served upon each public service company affected thereby. This subsection does not apply to small rural electric cooperatives.

III. Code of Federal Regulations

47 C.F.R. § 1.429 provides in pertinent part:

§ 1.429 Petition for Reconsideration

(i) The Commission may grant the petition for reconsideration in whole or in part or may deny the petition. Its order will contain a concise statement of the reasons for the action taken. Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstance, a second petition for reconsideration may be dismissed by the staff as repetitious.

No. 85-[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Are state utility regulatory commissions and their individual members excluded from the definition of "person" in Section 401(b) of the Communications Act, thereby rendering them immune from any suits by the FCC or private parties in federal court to enjoin their refusal to obey an FCC order?

2. Do the federal district courts have jurisdiction under Section 401(b) of the Communications Act (which authorizes suits to enforce "any order" of the FCC except an order for the payment of money) to enjoin a state commission's undenied violation of an FCC ruling that was served on the state commission and required compliance with depreciation rates and methods set by the FCC in proceedings in which the state commission participated?

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No. 84-1362

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BRIEF FOR THE RESPONDENT

COUNTER-STATEMENT OF THE CASE

This case involves a federal court injunction against the Maryland Public Service Commission's (hereinafter "Maryland PSC") undenied defiance of a series of Federal Communications Commission ("FCC") orders. In those orders the FCC (i) prescribed depreciation rates and methods for The Chesapeake and Potomac Telephone Company of Maryland's[1] (hereinafter

1. The parent of C&P, and its affiliates with publicly traded securities, were listed in note 1 of C&P's March 27, 1985 brief in opposition to the petition for a writ of certiorari in this case.

"C&P") telephone plant used to provide both interstate and intrastate services, and (ii) directed that all state utility commissions not depart from those depreciation rates and methods in setting charges for intrastate telephone services. The Maryland PSC did not seek appellate review of any of those orders. Instead, it simply refused to comply with those orders, even though it participated in the FCC proceedings in which the depreciation rates for C&P were set, and was served with a copy of the FCC ruling directing that the state commissions apply the FCC-prescribed depreciation rates in setting intrastate telephone charges.

The Maryland PSC now attempts to avoid enforcement of these orders by a strained construction of the statute authorizing enforcement. It goes so far as to argue that the orders cannot be enforced because its individual members are not "persons." It also argues that the statutory authority to enforce "*any* order" somehow does not include imperative and self-executing rulemaking orders served upon the violator by the FCC. Such arguments are plainly baseless and should not be permitted to excuse the Maryland PSC's defiance of a lawful FCC order.

The Communications Act Directs the FCC To Prescribe C&P's Depreciation Rates

C&P is a communications carrier which provides both interstate and intrastate service. As such, C&P is subject to federal regulation by the FCC under the Communications Act of 1934, 47 U.S.C. §§151 *et seq*. The Maryland PSC retains the authority to set the charges for C&P's intrastate telephone services, but this authority must be exercised within the federal regulatory framework established by the Communications Act. *See* 47 U.S.C. §§151, 152, 220.

Section 220(b) of the Communications Act requires the FCC to "prescribe" depreciation rates for C&P and prohibits C&P from departing in any manner from the FCC-prescribed depreciation rates. Before the FCC prescribes such depreciation rates for a carrier, it is required by Section 220(i) to give interested

state regulatory commissions notice and an opportunity to comment. Finally, Section 220(h) permits the FCC, if "it deems such action consistent with the public interest," to exempt C&P from depreciation rates prescribed under Section 220(b) in favor of state commission regulation of these matters. *See* 47 U.S.C. §220.

The FCC Has Prescribed Depreciation Rates for C&P

Acting pursuant to Section 220(b), the FCC prescribed depreciation rates for various classes of C&P's property in three separate orders (hereinafter the "Prescription Orders").[2] The Maryland PSC participated in the proceedings leading to each of these orders and voiced its opposition to the rates ultimately prescribed for C&P by the FCC.[3]

In each of the proceedings the question of whether the FCC's prescriptions would be binding for intrastate ratemaking purposes was considered.[4] In the first two of the Prescription Orders, the FCC indicated that the preemption issue would be dealt with in a separate and then pending proceeding. In the last of the Prescription Orders, the FCC announced that "[w]e have today ruled that such depreciation orders are binding at both the federal and state levels," *American Tel. & Tel. Co.*, *supra*, 92 F.C.C.2d at 700, and referenced its order adopted the same day

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2. *American Tel. & Tel. Co.*, 88 F.C.C.2d 1223, 1252 (1982) (FCC prescribes remaining life depreciation rates for C&P's existing telephone plant); *The Chesapeake and Potomac Tel. Co.*, 90 F.C.C.2d 964, 976 (1982) (FCC prescribes equal life group depreciation rates for C&P's new outside plant); *American Tel. & Tel. Co.*, 92 F.C.C.2d 693 (1982) (FCC prescribes equal life group depreciation rates for C&P's new central office equipment).

3. *American Tel. & Tel. Co.*, *supra*, 88 F.C.C.2d at 1232; *The Chesapeake and Potomac Tel. Co.*, *supra*, 90 F.C.C.2d at 968; *American Tel. & Tel. Co.*, *supra*, 92 F.C.C.2d at 698.

4. *American Tel. & Tel. Co.*, *supra*, 88 F.C.C.2d at 1237; *The Chesapeake and Potomac Tel. Co.*, *supra*, 90 F.C.C.2d at 971-72; *American Tel. & Tel. Co.*, *supra*, 92 F.C.C.2d at 700.

in the separate proceeding, *Amendment of Part 31, Uniform System of Accounts, etc.*, 92 F.C.C.2d 864 (1983) (hereinafter the "Preemption Order").

Although it was entitled to do so under Section 402(a) of the Communications Act,[5] the Maryland PSC, which had participated in each of the lengthy proceedings leading to adoption of the Prescription Orders, did not seek review in any of the United States Courts of Appeals of any of those orders.[6]

The FCC Preempted Contrary State Action

The FCC, in its comprehensive Preemption Order, concluded that where it prescribes depreciation rates pursuant to Section 220(b), state commissions are "precluded from departing" from those depreciation rates in setting intrastate charges for telephone services. (Joint Appendix at 40.)[7] This conclusion was based on a broad concern that the unwillingness of some state commissions to recognize FCC-prescribed depreciation rates was seriously undermining federal communications policy.[8]

5. Section 402(a) provides as follows:

"Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28." 47 U.S.C. §402(a).

6. The actual prescription of C&P's depreciation rates was preceded by an FCC proceeding instituted in 1973 which examined and resolved, with the active participation of the Maryland PSC and other state commissions, the appropriate methods to be used to prescribe depreciation rates. The FCC depreciation methods were intended to account for "the impact of new technology and the transition from a monopoly to a competitive environment." *Property Depreciation*, 83 F.C.C.2d 267, 290 (1980), *recon. denied*, 87 F.C.C.2d 916 (1981).

7. References to pages of the Joint Appendix hereinafter are indicated by "JA at ____."

8. Legally, the Preemption Order rested on two independent grounds: first, that there was an automatic preemptive effect of depreciation schedules under the express terms of Section 220(b) of the Communications Act; and, second, that an exercise of the FCC's discretionary authority to preempt was required in order to insure the implementation of federal policy under the doctrine articulated in *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) and *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). (JA at 40.)

The FCC directed that the Preemption Order be published in the *Federal Register* and individually "served on each state commission." (JA at 41.) It is not disputed that the Preemption Order was served on the Maryland PSC.

The FCC subsequently denied requests of the state commissions for a stay of the Preemption Order. In doing so, the FCC underscored the need for immediate compliance with the Preemption Order by the state commissions in the execution of their rate-setting functions:

> "The grant of a stay would interfere with our competitive policies. If a stay were to be granted, the capital recovery we found essential to the development of an efficiently functioning competitive marketplace would be halted. Moreover, there is no way that the carriers can retroactively recover the lost opportunity to recover the capital that would have been recovered in the absence of a stay if our decision is upheld on appeal." *Amendment of Part 31*, CC Docket No. 79-105, F.C.C. 83-349, ¶ 7 (July 22, 1983) (hereinafter the *"Denial of Stay"*).

Moreover, the FCC did not deny the stay motion in a vacuum: it stated its awareness that some of the state commissions, including the Maryland PSC, were openly refusing to obey the Preemption Order and it noted with approval decisions of federal district courts enjoining such actions. *Denial of Stay, supra, at* ¶¶ 3, 9.

The Preemption Order resulted from proceedings conducted on both the FCC's rulemaking and adjudicatory dockets. The proceeding on the rulemaking docket stemmed from a request by the American Telephone and Telegraph Company for reconsideration of a prior FCC decision concerning the preemptive effect of the FCC's depreciation prescriptions. *Amendment of Part 31*, 89 F.C.C.2d 1094 (1982). The proceeding on the

adjudicatory docket stemmed from a request by the General Telephone Company of Ohio that the FCC remedy the Public Utilities Commission of Ohio's refusal to follow FCC-prescribed depreciation rates. (JA at 18-19.) In its consolidated consideration of the two matters, the FCC received comments from numerous state regulatory commissions and from the National Association of Regulatory Utility Commissioners, of which the Maryland PSC is a member. The Maryland PSC did not appear directly in that proceeding.

On review pursuant to Section 402(a) of the Communications Act, the United States Court of Appeals for the Fourth Circuit in *Virginia State Corporation Commission v. FCC*, 737 F.2d 388 (4th Cir. 1984), upheld the Preemption Order as "a valid and complete preemption of state regulation regarding interstate and intrastate depreciation rates and methods for the specified telephone equipment." 748 F.2d at 880. The correctness of that decision is now before this Court in *California v. FCC*, *cert. granted*, 105 S. Ct. 3497 (1985) (No. 84-889), and several companion cases.[9]

The Maryland PSC Ignored the FCC's Order and Used Different Depreciation Rates

In a general ratemaking proceeding relating to C&P, the Maryland PSC on February 18, 1983 issued an order in which it expressly refused to comply with the FCC's Preemption Order, and sought to apply depreciation rates and methods for intrastate service different from those prescribed by the FCC in the Prescription Orders. (JA at 50.) The stated reason for this action was that the FCC's preemption determination was simply wrong.[10]

9. These are *Louisiana Public Service Comm'n v. FCC*, 737 F.2d 388 (4th Cir. 1984), *appeal filed*, 105 S. Ct. 3496 (1985) (No. 84-871) (jurisdictional finding postponed to hearing of case on the merits); *Public Utilities Comm'n of Ohio v. FCC*, 737 F.2d 388 (4th Cir. 1984), *cert. granted*, 105 S. Ct. 3498 (1985) (No. 84-1054); and *Florida Public Service Comm'n v. FCC*, 737 F.2d 388 (4th Cir. 1984), *cert. granted*, 105 S. Ct. 3498 (1985) (No. 84-1069).

10. The Maryland PSC determined that "the depreciation practices established by the FCC in no way limit this Commission's authority to independently determine the appropriate level of depreciation expense to be reflected

The District Court Granted C&P's Motion for a Preliminary Injunction

C&P then initiated this action in the United States District Court for the District of Maryland to enjoin the Maryland PSC and each of its individual members from prohibiting C&P from collecting $16.1 million (or $44,000 per day) in charges — an uncontested sum — that reflected the revenue difference between the FCC - mandated depreciation rates and those ordered by the Maryland PSC. (JA at 134.) Jurisdiction was asserted under Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), and under the "federal question" jurisdictional provisions of 28 U.S.C. Sections 1331 and 1337. (JA at 9.) Section 401(b) is a broadly worded statutory provision that authorizes the United States, the FCC, and *any injured party* to bring suit in the federal district courts for the enforcement of "any order of the Commission other than for the payment of money" against "any person" disobeying such an order, provided only that the order is "regularly made and duly served."[11]

After determining that jurisdiction existed under Section 401(b), the district court entered a preliminary injunction requiring the Maryland PSC to permit C&P to use the deprecia-

in intrastate rates for telephone service." Order No. 66114, *In the Matter of the Application of the Chesapeake and Potomac Tel. Co. of Maryland for Authority to Increase and Restructure Its Schedule of Rates and Charges*, Case No. 7661, at 18 (Feb. 18, 1983). (JA at 67.)

11. Section 401(b) provides, in full, as follows:

> "If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

tion rates and methods prescribed by the FCC.[12] The court rejected the notion that the Maryland PSC and its members were not "persons" within the meaning of Section 401(b). 560 F. Supp. at 846-47.[13] The court also found that C&P was sustaining irreparable injury because state law precluded C&P from any subsequent recovery of the intervening shortfall in revenues that resulted from the depreciation rates dictated by the Maryland PSC. *Id.* at 848. In contrast to this injury, the court noted that C&P's application of the FCC -prescribed depreciation rates and methods would only result in roughly a "penny per day" in increased charges to C&P's customers. *Id.* (*See* JA at 145.)

The Fourth Circuit Upheld the District Court's Decision

The Maryland PSC appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's decision.[14] The court of appeals first noted its previous affirmance of the validity of the FCC's Preemption Order in *Virginia State Corporation Commission v. FCC, supra*. The court went on to reject the argument that the Maryland PSC is not a "person" subject to suit under Section 401(b), noting both (i) that the individual officials comprising the Maryland PSC were named as defendants, and (ii) that the Maryland PSC's position "would undermine the Federal Communications Act by rendering PSC and other communications 'entities' immune from enforcement actions by the FCC under Section 401(b)." 748 F.2d at 881. The court of appeals also rejected an argument, first made on appeal, that the Preemption Order was not an " 'order' within the meaning of Section 401(b)." *Id.*[15]

12. *The Chesapeake and Potomac Tel. Co. of Maryland v. Public Service Comm'n of Maryland*, 560 F. Supp. 844, 849 (D. Md. 1983).

13. Before the district court, the Maryland PSC did not even advance the argument now presented that the Preemption Order is not an "order" enforceable under Section 401(b).

14. *The Chesapeake and Potomac Tel. Co. of Maryland v. Public Service Comm'n of Maryland*, 748 F.2d 879 (4th Cir. 1984).

15. Because the district court and court of appeals determined that jurisdiction existed under Section 401(b) of the Communications Act, neither

The Fifth Circuit and the Eighth Circuit, like the Fourth Circuit in this case, have also held that the federal district courts have jurisdiction, pursuant to Section 401(b), to enjoin state commissions' refusals to follow the Preemption Order. *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984), *appeal filed*, 53 U.S.L.W. 3449 (U.S. Nov. 30, 1984) (No. 84-870); *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, 738 F.2d 901 (8th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3290 (U.S. Sept. 26, 1984) (No. 84-483).[16] Only the First Circuit has found the Preemption Order not to be enforceable in an action brought under Section 401(b). *New England Telephone and Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3460 (U.S. Dec. 5, 1984) (No. 84-900). The Court has held in abeyance the requests for review of these decisions.

This Court granted certiorari on June 24, 1985, and directed that oral argument in this case be held in tandem with *California v. FCC* and the companion cases challenging the validity of the Preemption Order.

passed on C&P's claim that jurisdiction existed as well under 28 U.S.C. §§ 1331 and 1337. Under the latter provisions, the courts have exercised jurisdiction to declare unlawful and enjoin state regulation preempted by the FCC. *Brookhaven Cable TV Inc. v. Kelly*, 428 F. Supp. 1216 (N.D.N.Y. 1977), *aff'd*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979); *Springfield Television, Inc. v. City of Springfield*, 428 F.2d 1375 (8th Cir. 1970). *See generally Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

16. Several district courts have also enforced the Preemption Order under Section 401(b). *E.g.*, *Wisconsin Bell, Inc. v. Public Service Comm'n of Wisconsin*, Civ. No. 84-C-4 (E.D. Wis. Nov. 13, 1984), *appeal pending*, No. 84-3110 (7th Cir.); *Northwestern Bell Tel. Co. v. Iowa State Commerce Comm'n*, No. 83-688-A (S.D. Iowa Sept. 27, 1984); *Mountain States Tel. & Tel. Co. v. Department of Public Service Regulation*, 588 F. Supp. 5, 9 (D. Mont. 1983); *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, No. 83-4090 (D. Kan. Apr. 8, 1983), *appeal pending*, No. 84-2295 (10th Cir.); *Pacific N.W. Bell Tel. Co. v. Washington Utility and Transportation Comm'n*, 565 F. Supp. 17, 21 (W.D. Wash. 1983), *appeal pending*, No. 83-3746 (9th Cir.).

SUMMARY OF ARGUMENT

In providing in Section 401(b) for the enforcement by private parties of "any order" of the FCC in the federal district courts against "any person" disobeying the order, Congress plainly contemplated that parties injured by noncompliance with FCC orders that were "duly served" upon any violator should be entitled to seek relief themselves in the federal district courts. This fundamental enforcement policy is ignored entirely by the Maryland PSC and supporting state commission *amici curiae* (hereinafter "supporting *amici curiae*"). But it is the crux of Section 401(b) and should be dispositive of this case: the openly acknowledged noncompliance of the Maryland PSC and its individual members with a clear, imperative, and immediately effective FCC ruling intended to implement federal communications policy (the Preemption Order) was irreparably injuring C&P, and the federal court properly granted C&P relief to put an end to that injury and to require adherence to federal law as determined and implemented by the FCC.

The constricted meanings urged by the Maryland PSC of the phrases "any person" and "any order" as they appear in Section 401(b) have no merit:

1. The court of appeals correctly concluded that the individual members of the Maryland PSC were "persons" within the meaning of the Communications Act, and therefore subject to suit under Section 401(b). Section 3(i) of the Act, 47 U.S.C. § 153(i), clearly defines the term "person" as including such individuals, and the naming of state officials as defendants in injunction actions such as this is consistent with longstanding practice under the decisions of the Court.

The court of appeals was also correct in determining, in the alternative, that "state commissions" are "persons" within the meaning of the Act. If "state commissions" (or their individual members) are not regarded as "persons" under the Communications Act, then there would be no means for anyone — including the FCC — to bring suit in the federal courts to enjoin the states from intruding into areas clearly reserved under the Communications Act for federal regulation. It is inconceivable

that Congress, *sub silentio*, intended to withhold from the federal courts in this manner all jurisdiction over state action inconsistent with a comprehensive federal statute regulating the huge telecommunications industry. The Maryland PSC's contrary contentions are completely unsupported.

2. The Preemption Order was served upon the Maryland PSC and was intended by the FCC to be immediately binding without further agency action. Under these circumstances, the Preemption Order is in both name and substance an "order" within the meaning of Section 401(b). This conclusion is supported by the decisions of this Court (i) indicating that the FCC has broad authority to issue such "orders" as are necessary to carry out its responsibilities, and (ii) construing the term "order" in Section 402(a) of the Communications Act as including self-executing FCC regulations.

The FCC has spoken in favor of the private enforcement of the Preemption Order under Section 401(b), and as the agency responsible for administering the Communications Act, its views are entitled to great weight. Contrary to the Maryland PSC's contentions, the FCC's role in implementing federal communications policy is ***enhanced*** by expeditious private enforcement of violations of imperative, immediately effective and unambiguous rulings such as the Preemption Order which have been served on the violator by the FCC. Moreover, the federal district courts are fully capable of enforcing clear-cut FCC rulings such as the Preemption Order, as Congress intended in Section 401(b), and the district court below properly did so.

ARGUMENT

I. THE MARYLAND PSC AND ITS MEMBERS ARE "PERSONS" SUBJECT TO THE JURISDICTION OF THE FEDERAL COURTS UNDER SECTION 401(b)

The court of appeals correctly determined that the individual members of the Maryland PSC, and the Maryland PSC itself, are "persons" subject to suit under Section 401(b). These alternative holdings are both consistent with the language of the statute and its legislative purpose.

A. Jurisdiction Existed Under Section 401(b) Because the Individual Members of the Maryland PSC Were Named as Defendants and Are Indisputably "Persons"

Section 401(b) of the Communications Act gives the federal district courts jurisdiction over suits to enforce an FCC order against "any person" disobeying such an order. Like Section 401(b), the other enforcement provisions of the Communications Act provide for proceedings against "persons." For instance, under Section 401(a) of the Communications Act, 47 U.S.C. § 401(a),[17] the federal district courts have jurisdiction over suits brought by the FCC against "persons" for violations of the Communications Act.

The term "person" is defined in Section 3 of the Communications Act as follows:

"For the purpose of this Act, unless the context otherwise requires —

* * *

17. Section 401(a) provides as follows:

"The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of *any of the provisions of this chapter* by *any person*, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter." 47 U.S.C. § 401(a) (emphasis added).

(i) 'Person' includes an *individual*, partnership, association, joint-stock company, trust, or corporation.' " 47 U.S.C. §153 (emphasis added).

The individual members of the Maryland PSC were named as defendants in C&P's complaint (JA at 9-10), and were enjoined by the district court from disobeying the Preemption Order. (Petition for Writ of Certiorari at 12a.) They are clearly "individuals." By the direct definitional language of Section 3(i) of the Communications Act, and as the court of appeals held, the commission members — being individuals — are thus "persons" and subject to the jurisdiction of the federal courts in a Section 401(b) action. 748 F.2d at 881.

This "plain meaning" reading of the Communications Act is completely dispositive of the Maryland PSC's contention that jurisdiction did not exist for want of a "person." As the Court recently held, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.' " *Garcia v. United States*, 105 S. Ct. 479, 483 (1984) (citations omitted).[18] There are no such "rare and exceptional circumstances" here, as there is no discernible legislative history indicating that the term "person" should not be given its natural meaning — and the meaning expressly set forth in Section 3(i) — with respect to individual members of a state commission. (*See* pp. 16-19, *infra*.)

The court of appeals' holding that the individual members of the Maryland PSC are "persons" subject to suit under Section 401(b) fully accords with the longstanding practice of naming state officials as defendants in injunction actions seeking compliance by state agencies with federal law. This practice grew out of the Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), holding that where the Eleventh Amendment of the United States Constitution would bar an action against a state, federal courts are authorized — through prospective injunctions — to require individual officers acting in their official capacities to

18. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

comply with federal law.[19] The *Ex parte Young* doctrine was recently reaffirmed by the Court's unanimous decision in *Kentucky v. Graham*, 105 S. Ct. 3099 (1985), where the Court stated that "[i]n an injunctive or declaratory action grounded on federal law, the State's [Eleventh Amendment] immunity *can* be overcome by naming state officials as defendants." 105 S. Ct. at 3107 n.18 (emphasis in original).[20]

Indeed, to the extent that the language of the Communications Act is not as explicit as it might be in expressly making state commissions themselves subject to enforcement proceedings, it is likely because Congress understood that the usual and proper means of compelling their compliance with federal law would be through injunction suits against individual state officials. At the time the Communications Act was enacted in 1934, this practice was already over twenty-five years old.

B. Congress Did Not Intend in the Communications Act To Immunize State Commissions from Enforcement Proceedings in the Federal Courts

The court of appeals below concluded that the Maryland PSC is also a "person" within the meaning of Section 401(b) because "[a] contrary interpretation would undermine the Federal Communications Act by rendering PSC and other communications 'entities' immune from enforcement actions by the FCC under Section 401(b)." 748 F.2d at 881. This alternative holding, like the holding that the individual members of the Maryland PSC are "persons," accords with the language of the Communications Act as well as its legislative purpose.

In the first instance, this holding that the term "person" includes a "state commission" is in no way inconsistent with the plain language of the statute. Section 3(i) of the Act, by saying

19. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Edelman v. Jordan*, 415 U.S. 651, 664 (1974); C. Wright, *The Law of Federal Courts* 292 (4th ed. 1983).

20. In recognition of the *Ex parte Young* doctrine, the Maryland PSC has not argued at any stage of this case that its individual members are not subject to suit in federal court by virtue of the Eleventh Amendment, and that issue is therefore not presented in this case.

what the term "person" "includes," makes the provision expressly illustrative rather than exhaustive.[21] The Maryland PSC concedes as much. (Brief for the Petitioner at 12-13.)

In fact, Congress provided that the definitions in the Act only apply "unless the context otherwise requires." 47 U.S.C. § 153. In addition, this Court has specifically concluded on several occasions that, for lack of compelling reasons otherwise, the term "person" in a federal statute should be construed as including states and state agencies even though the statute does not specifically reference those entities.[22] As the Court has explained:

> "Whether the word 'person' or 'corporation' includes a State or the United States depends upon its legislative environment. . . . '[T]here is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent by the use of the term, to bring state or nation within the scope of the law.' " *Georgia v. Evans*, 316 U.S. 159, 161 (1942) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941)).[23]

21. *See generally Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle").

22. *See, e.g., Sims v. United States*, 359 U.S. 108, 113 (1959) (construing Internal Revenue Code); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 452 (1945) (construing Clayton Act); *Georgia v. Evans*, 316 U.S. 159, 160-63 (1942) (construing Sherman Act); *United States v. California*, 297 U.S. 175, 186 (1936) (construing Safety Appliance Act); *Ohio v. Helvering*, 292 U.S. 360 (1934) (construing 26 U.S.C. § 205).

23. The Maryland PSC's argument that "Congress clearly would have expressly included 'state commission' in the definition of 'person' if it intended the latter to encompass the former" (Brief for the Petitioner at 14), is pure conjecture. *See Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942) ("The search for significance in the silence of Congress is too often the pursuit of a mirage."). Further, although Congress used both "person" and "state commission" in Section 208 of the Communications Act, 47 U.S.C. § 208, as the Maryland PSC points out, Congress also referred to "State commission[s] . . .

All of the factors cited by the Court weigh in favor of the treatment of "state commissions" — and, of course, their individual members as well — as "persons" for purposes of Section 401(b). In enacting the Communications Act, Congress intended to establish comprehensive federal regulation of interstate communication.[24] In furtherance of the Act's comprehensive federal regulatory scheme, Congress provided in Section 401(b) for the enforcement of FCC orders against "any person" in federal district court. There is *nothing* in the Communications Act or its legislative history — and for that reason nothing is cited by the Maryland PSC — indicating that state commissions or their individual members were intended to be immune from such suits when they ignore the dictates of a federal regulatory determination, as the Maryland PSC has done here.[25]

The correctness of the court of appeals' determination that "state commissions" and their individual members are "persons" subject to federal court jurisdiction under Section 401(b) can also be demonstrated by considering the startling implications of the Maryland PSC's contrary contention. Because Section 401(b) and the other enforcement provisions of the Communications

NOTES *(Continued)*

and to such *other* persons" elsewhere in the Act, thereby suggesting that "state commission" could be subsumed within the term "person." *See* 47 U.S.C. §§ 221(a), (c) (emphasis added). In the final analysis, however, these semantic adventures in statutory construction lead to ambiguous conclusions, and carry little weight.

24. The FCC was "given 'broad responsibilities' to regulate all aspects of interstate communication by wire or radio by virtue of § 2(a) of the Communications Act of 1934, 47 U.S.C. § 152(a)," *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694, 2701 (1984), and the FCC's authority extends to all regulatory actions necessary to "ensure the achievement of the Commission's statutory responsibilities." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

25. The proper course for a state commission seeking redress from the effect of the Preemption Order is direct review under Section 402(a) of the Communications Act rather than through open defiance. *See FCC v. ITT World Communications, Inc.*, 104 S. Ct. 1936, 1939 (1984). Whether the FCC improperly intruded into an area reserved for state regulatory action is, of course, before the Court in *California v. FCC, supra*. If the Court should find the Preemption Order to be an improper exercise of federal regulation, this case should be remanded to the district court for dismissal.

Act all provide for enforcement actions against "persons" (*see* p. 12, *supra*), the Maryland PSC's argument that neither it nor its members are "persons," if accepted, would immunize all state commissions and members thereof from suit by both the FCC and private parties in federal court respecting violations of express FCC orders as well as violations of the Communications Act itself. Under the Maryland PSC's theory, recourse against the state commission and its members for violation of the federal statute — even on the part of the United States — could be had *only* in state court.[26] (Brief for the Petitioner at 8.)

It is inconceivable, however, that Congress intended, without expressly saying so, to divest the federal courts of jurisdiction over such matters. As noted above, the Communications Act is a comprehensive federal statute regulating one of the nation's largest industries. Its basic purpose "was to protect the public interest in communications," *Scripps-Howard Radio, supra*, 316 U.S. at 14, by formulating "a unified and comprehensive regulatory system for the industry." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Congress' desire to achieve a unified communications system is "as capable of being obstructed by state as by individual action," *United States v. California, supra*, 297 U.S. at 186 (construing the Safety Appliance Act), and there is no reason why state commissions and their members alone should not be subject to suit in federal court if they take action proscribed by FCC orders or the Communications Act.[27]

Indeed, the goal of a unified communications system would be greatly hindered if the FCC and other parties had to rely exclusively on the state courts — with their varying procedural requirements, remedial measures, and jurisdictional limitations

26. There would also be other inexplicable results if state agencies were not "persons" within the meaning of the Communications Act. For instance, state agencies would not be "persons" able to obtain radio licenses or seek reconsideration of FCC decisions. 47 U.S.C. §§ 301, 405.

27. As Chief Justice Burger wrote, when he was on the District of Columbia Circuit, "the [FCC's] regulatory and enforcement powers should not be artificially fragmented or compartmentalized when the result would be to frustrate a comprehensive, pervasive regulatory scheme." *General Tel. Co. of California v. FCC*, 413 F.2d 390, 402 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

on action against state entities — for enforcement of FCC orders and the Communications Act.[28] The hodge-podge that would result could not be what Congress intended.

Significantly, the Court has previously rejected the contention that federal rights can be raised only in state court absent "some indication that Congress in fact wished to limit the litigation of a federal right to the state courts."[29] *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 n.8 (1979). But as noted above, there is no hint whatever in the Communications Act or its legislative history that FCC orders directing state commissions to cease encroachment upon areas of exclusive federal authority should not be enforceable by *anyone* in the federal courts.

Because the construction of the term "person" advanced by the Maryland PSC would divest the federal courts of jurisdiction over the most blatant incursions by state commissions and their members on areas indisputably reserved for federal regulation, it is no answer for the Maryland PSC to urge that the Preemption Order infringes on an area of regulation properly reserved to the states. (Brief for the Petitioner at 19-20.)[30] The Maryland PSC's emphasis on the alleged invalidity of the Preemption Order is totally irrelevant to the construction of the term "person," which

28. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (state limitations on subject-matter jurisdiction apply in state court suit to enforce federal law); 16 Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure* § 4023 (1977) (applicability of state procedure when federal issues are presented in state court).

29. The federal courts generally have jurisdiction over any civil action "arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331.

30. Nor is there any merit to the Maryland PSC's suggestion that "abstention" by the federal courts is required in this case. (Brief for the Petitioner at 20.) It is well-settled that abstention by the federal courts is inappropriate where, as here, state law is preempted. In such circumstances, the basic premise of abstention — avoidance of federal intrusion into essentially local matters — is absent. *E.g.*, *Baggett v. Department of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983). Similarly, the Johnson Act by its terms does not prevent the federal courts from enjoining state regulatory actions where, as here, there is a specific statutory basis for federal jurisdiction (Section 401(b)) and where, as here, the state action is interfering with federal regulation of interstate commerce. 28 U.S.C. § 1342.

presents only the jurisdictional question whether state commissions or their individual members are subject to suit in federal court under Section 401(b).

In sum, the language of the Communications Act, as well as its legislative history, is utterly devoid of any support for the Maryland PSC's contention that "state commissions" or their individual members are not "persons" subject to federal court jurisdiction under Section 401(b). To the contrary, the achievement of the Act's objectives is furthered by federal district court jurisdiction, under Section 401(b), over violations of FCC orders by state commissions as well as others.

II. THE PREEMPTION ORDER IS AN "ORDER" ENFORCEABLE UNDER SECTION 401(b)

Section 401(b) of the Communications Act provides, in sweeping terms, that "any order" of the FCC other than an order for the payment of money may be enforced in federal district court by the FCC, the United States, or by any party injured by noncompliance with the "order." Inasmuch as the Preemption Order required specific action by the Maryland PSC and others, was served upon the Maryland PSC, and was intended to be immediately binding without further agency action, the Preemption Order is in substance as well as in name an "order" and is therefore enforceable under Section 401(b). This conclusion is confirmed by precedent of this Court, the federal interest in the sound enforcement of the Communications Act, and the views of the FCC.

A. The Preemption Order Stated Specific Requirements To Be Followed by the Maryland PSC

In construing the term "order" as it is found in Section 401(b) — as was the case with the term "person" — the Court must be guided first by the term's plain meaning. *Garcia v. United States, supra*. The dictionary definition of "order" is "a command, direction, or instruction, usually backed by authority." *Webster's New World Dictionary* 1000 (2d ed. 1980).

The Preemption Order was plainly an "order" within this meaning in that the FCC, exercising its federal authority, required therein that the state commissions, including the Maryland PSC, apply the FCC-prescribed depreciation rates and methods in determining telephone carriers' charges for intrastate service.

The imperative character of the Preemption Order, and the FCC's intention to require immediate compliance by the Maryland PSC, is evident from several factors:

First, the Prescription Order proceedings — in which the Maryland PSC participated — established depreciation rates and methods that were to apply to C&P. In the last of the Prescription Orders, the FCC cited the Preemption Order and stated that "[w]e have today ruled that such depreciation orders are *binding* at both the federal and state levels." *American Tel. & Tel. Co., supra*, 92 F.C.C.2d at 700 (emphasis added). The Maryland PSC was thus no stranger to the Preemption Order; to the contrary, the requirements of the Preemption Order were directed expressly at the Maryland PSC inasmuch as they were specifically referenced in and incorporated into a ratemaking order in proceedings in which the Maryland PSC participated.[31]

Second, in the Preemption Order the FCC stated in no uncertain terms that the state commissions are "precluded from departing" from the FCC-prescribed depreciation rates in setting charges for intrastate telephone service. (JA at 40.)[32] This is not the language of a general interpretive statement; it is rather the language of specific command, and was undoubtedly so understood by the Maryland PSC when it decided to defy the Preemption Order. It was, after all, not until the appellate level of this case that the Maryland PSC even advanced the argument

31. These factors indicate that this case could be regarded not only as a suit to enforce the Preemption Order, but also as a suit to enforce C&P's rights under the Prescription Orders. As noted, the FCC directed in the third Prescription Order that the FCC-prescribed depreciation rates and methods were to apply for intrastate purposes as well, and the Maryland PSC participated in the Prescription Order proceedings.

32. The FCC further stated that "this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rules." (JA at 40.)

that the Preemption Order was not an "order" under Section 401(b).

Third, the FCC directed that the Preemption Order — expressly denominated by the FCC as a "Memorandum Opinion and Order" (JA at 18) — be served on each state commission. (JA at 41.) It was served on the Maryland PSC.

Fourth, there is nothing in the Preemption Order suggesting any need for further FCC interpretation or action to implement the Order's straightforward and specific requirement that the state commissions apply the FCC-prescribed depreciation rates and methods in setting charges for intrastate service. As the FCC indicated in denying the motion to stay the effectiveness of the Preemption Order (p. 5, *supra*), the FCC intended to require the state commissions to comply *immediately* with the FCC's directive.

Under these circumstances, the Maryland PSC's characterization of the Preemption Order as nothing more than an effort "to provide 'guidance' to state commissions by clarifying the effect of the FCC's depreciation prescriptions" must be rejected. (Brief for the Petitioner at 26.) The context and character of the Preemption Order establish that it was, and was intended by the FCC to be, an imperative and immediately effective order directed to the Maryland PSC and other state commissions.

Significantly, the Preemption Order was properly viewed by the district court as conclusively valid for purposes of C&P's suit under Section 401(b), as the validity of an FCC order can only be reviewed by a court of appeals pursuant to Section 402 of the Communications Act. *FCC v. ITT World Communications, supra*, 104 S. Ct. at 1939.[33] The district court therefore was correct in preliminarily enjoining the Maryland PSC and its individual members from disobeying the presumptively-valid

33. Only "regularly made" orders can be enforced under Section 401(b), but as the district court noted, this "refers to procedural regularity because jurisdiction over the issue of the validity of an FCC Order is vested exclusively in the Court of Appeals." 560 F. Supp. at 848. The procedural regularity of the Preemption Order has not been challenged in this case. *Id. See Southwestern Bell Tel. Co., supra*, 738 F.2d at 907.

Preemption Order, no matter what the Court's ultimate determination of the validity of the Preemption Order in *California v. FCC*, *supra*. *See* note 25, *supra*.

B. The Substance of the Preemption Order, and Not the Method by Which It Was Adopted, Demonstrates Its Character as an "Order" Under Section 401(b)

In seeking to justify its disregard of the FCC's Preemption Order, the Maryland PSC argues that only "adjudicatory orders" are enforceable under Section 401(b), and that the Preemption Order is not such an "order" because it was "the product of a rulemaking." (Brief for the Petitioner at 8, 21.) This distinction, which exalts form over substance, finds no support in the language of the statute or the decisions of the Court.

In the first instance, the language of Section 401(b) broadly provides for the enforcement of "any order" other than an order for the payment of money, and does not distinguish in any fashion between (i) "adjudicatory orders" and (ii) "rulemaking orders" having immediate force and commanding specific action.[34] It is well-settled that administrative agencies can require or prohibit conduct through either adjudication or rulemaking;[35] both types of agency action are commonly referred to as "orders";[36] and compliance with adjudicatory and rulemaking "orders" is equally required by law.[37]

Moreover, the term "order" is not, as the Maryland PSC urges, used narrowly in the Communications Act: Section 4(i)

34. The definition of the term "order" in the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(6), relied upon by the Maryland PSC, has no applicability in construing the same term in the Communications Act, which was enacted twelve years before the APA. In fact, the APA definition is, by its terms, applicable only for the purpose of the APA. In non-APA contexts, the term "order" is used with different meanings. *See* B. Schwartz, *Administrative Law* § 4.1 (2d ed. 1984).

35. *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

36. For example, in *FCC v. ITT World Communications*, *supra*, 104 S. Ct. at 1939, the Court referred to the FCC's denial of a rulemaking petition as a "final FCC order."

37. The willful violation of FCC rules and regulations can result in a severe fine under Section 502 of the Communications Act. 47 U.S.C. § 502.

broadly provides that the FCC may "issue such orders . . . as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Indeed, as the Court has previously stated in holding that the FCC has broad power to issue different types of prohibitory orders under Section 4(i):

> "This Court has recognized that 'the administrative process [must] possess sufficient flexibility to adjust itself' to the 'dynamic aspects of radio transmission,' [citation omitted], and that it was precisely for that reason that Congress declined to 'stereotyp[e] the powers of the Commission to specific details . . . .' [citation omitted]." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180 (1968).

This principle belies the Maryland PSC's efforts to read into Section 401(b) an artificial and inflexible distinction between "orders" (i) that are the product of adjudicatory proceedings and (ii) highly specific orders, like the Preemption Order, that were the product (at least in part) of the FCC's rulemaking docket. Since there is also a total absence of legislative history supporting the narrow construction of the term "order" advanced by the Maryland PSC,[38] that construction should be rejected under general principles of statutory construction. *See Garcia v. United States*, *supra*.

The character of the Preemption Order as an "order" within the meaning of Section 401(b) is further confirmed by the Court's decision in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942). In that case, CBS brought an

38. Section 401(b) was modeled after 49 U.S.C. Section 16(12), a provision of the Interstate Commerce Act. *See* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934). While several cases cited by the Maryland PSC (Brief for the Petitioner at 33-34) have construed Section 16(12) as permitting enforcement only of orders commanding certain individuals to take particular actions, the Preemption Order effectively does just that. Moreover, other courts have enforced general rules and regulations under Section 16(12). *See Pacific Fruit Express Co. v. Akron, Canton & Youngstown R.R.*, 524 F.2d 1025, 1031 (9th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *United States v. City of Jackson*, 318 F.2d 1, 9 (5th Cir. 1963).

action in district court under Section 402(a) of the Communications Act, seeking judicial review of an FCC regulation that precluded a broadcast station from obtaining a license if the station entered into certain types of contracts with a broadcast network.

In finding that the FCC regulation concerning contracts between radio stations and networks was an "order" within the meaning of Section 402(a), the Court first observed that "it is the *substance* of what the Commission has purported to do and has done which is decisive." 316 U.S. at 416 (emphasis added). With this governing principle, the Court found the regulation to be a reviewable "order" because the regulation was "self-executing" in that compliance by broadcast stations had an immediate practical impact upon the contractual relations between the stations and CBS (the network).[39]

The Court's holding is also applicable to the Preemption Order and demonstrates that it is an "order" within the meaning of Section 401(b):

— *First*, the Preemption Order is, perhaps even more than the FCC regulation in *CBS*, an agency action with immediate force. (*See* pp. 20-22, *supra*.) It is indisputably an "order" for purposes of the judicial review it is receiving under Section 402(a), and should be so regarded for purposes of Section 401(b) because there is a "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932).

— *Second*, this natural presumption is strongly reinforced by the fact that, at the time of the *CBS* decision,

39. The Court noted that regulations may have the "force of law before their sanctions are invoked as well as after," and held that "[w]hen, as here, [regulations] are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provision of §402(a) . . . ." 316 U.S. at 418-19. Numerous FCC regulations and other actions have, subsequent to the *CBS* case, been reviewed as FCC "orders" under Section 402(a). *E.g.*, *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 773 (1978); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (D.C. Cir. 1976).

Section 402(a) described procedures to be followed for *enforcement*, as well as judicial review, of FCC orders in the federal courts.[40] The Court in *CBS* was thus construing a statutory provision involving the enforcement of "any order of the Commission" — the exact same language used in Section 401(b),[41] granting jurisdiction to the federal district courts — and its holding therefore extends directly to an enforcement case such as this.

— *Third*, the same considerations of fairness that were of concern to the Court in *CBS* — *i.e.*, affording aggrieved parties an opportunity to challenge FCC action with an adverse effect on them — are at play here. Substantial unfairness and harm to a party (C&P) can arise through another entity's (the Maryland PSC) noncompliance with an FCC ruling intended to have immediate force and to benefit the first party (C&P), just as in *CBS* harm to the party seeking review (the network) could arise through compliance by others (the stations) with an allegedly improper regulation.[42] Indeed, to obtain preliminary injunctive relief from the district court under Section 401(b), C&P was required to and

40. Section 402(a) then provided that suits to "*enforce*, enjoin, set aside, annul, or suspend *any order of the Commission*" (except for certain types of orders made reviewable exclusively in the District of Columbia Circuit by Section 402(b)) shall be brought before a three-judge district court panel in the same manner as provided with respect to the "enforcing or setting aside of the orders of the Interstate Commerce Commission." 48 Stat. 1064, 1093 (1934) (emphasis added). *See* S. Rep. No. 781, 73d Cong., 2d Sess. 9 (1934). By the Communications Act Amendments of 1952, Pub. L. No. 82-554, Congress amended Section 402(a) to provide for review of "orders" by the courts of appeals instead of by three-judge district court panels. *See* H.R. Rep. No. 1750, 82d Cong., 2d Sess. 17 (1952); *see generally FCC v. American Broadcasting Co.*, 347 U.S. 284, 289 n.4 (1954). Congress undoubtedly deleted the word "enforce" from the amended version of Section 402(a) because it did not wish FCC orders to be enforceable in the courts of appeals, but rather in the district courts.

41. As it does today, Section 401(b) at the time of the *CBS* decision provided the federal district courts with *jurisdiction* over suits to enforce FCC orders.

42. *See South Central Bell Tel. Co.*, *supra*, 744 F.2d at 1118.

did demonstrate irreparable harm stemming from the Maryland PSC's refusal to obey the Preemption Order. 560 F. Supp. at 848.

— *Fourth*, it is difficult to believe that Congress contemplated that certain agency actions would be reviewable "orders" for purposes of Section 402(a) but not enforceable "orders" for purposes of Section 401(b). Indeed, it is precisely the prospect of enforcement of the Preemption Order that renders it a reviewable FCC "order" under Section 402(a).[43]

The Court need not determine here whether *all* FCC regulations — no matter how general in their terms and applicability — are enforceable under Section 401(b). Because of the imperative nature of the Preemption Order, as described above, it is only necessary for the Court to follow its *CBS* holding and rule that the term "order" in Section 401(b) includes all FCC directives and rulings that (i) are "regularly made and duly served," as required for enforcement under Section 401(b), and (ii) are "self-executing" in substance in that they are intended to mandate specific action by particular parties without further agency action. As set forth next, this position does not present any of the policy evils conjured up by the Maryland PSC and supporting *amici curiae* in their respective briefs.

43. The enforceability under Section 401(b) of FCC actions taken through the rulemaking docket is also demonstrated by the Court's decision in *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945). In that case, the Court held that the FCC could bring suit under "§401" against hotels for their violation of a tariff regulation that had been filed by a telephone company in compliance with an FCC rulemaking order but that had not been specifically reviewed by the FCC. In citing "§401" in support of its conclusion that "the prosecution of an action to restrain a violation is authorized," 325 U.S. at 325, the Court could only have been referring to Section 401(b). Section 401(a) — the only other portion of Section 401 granting the federal district courts any jurisdiction — only authorizes a district court to enjoin violations of the Communications Act itself and the violation of a tariff regulation is obviously not a violation of any provision of the Act. (*See* pp. 29-30, *infra*.) If a tariff filed by a telephone company is enforceable under Section 401(b), a formal FCC ruling such as the Preemption Order should certainly be enforceable as well.

C. The Enforcement of the Preemption Order Under Section 401(b) Is Consistent with the Policies of the Communications Act

1. Private Enforcement of the Preemption Order Advances the Federal Interest and Is Necessary To Prevent Irreparable Harm to Regulated Parties

Section 401(b) of the Communications Act provides for the enforcement of FCC "orders" by *private parties* in the *federal district courts*. Congress obviously contemplated by that provision that private parties and the federal district courts would both have a legitimate role to play in implementing federal communications policy by enforcing clear-cut and imperative FCC decisions, such as the Preemption Order. Congress did not require the participation of the FCC in every suit brought by private parties to enforce an FCC "order," nor did it fear that the district courts would be incapable of determining whether violations of the FCC "order" had occurred, or whether the violators complied with the courts' injunctive orders.

In recognition of these principles, the FCC has spoken in favor of the enforcement of the Preemption Order by private parties in Section 401(b) suits, and has specifically taken the position that the Preemption Order is an "order" within the meaning of Section 401(b). In an *amicus curiae* brief submitted to the First Circuit in *New England Telephone*, *supra*, in support of a petition for rehearing, the FCC said as follows:

> "The Commission has broad discretion to use either rulemaking or case-by-case adjudication (or some combination of both) to carry out its responsibility to enforce the Act. It is well within that discretion for it to adopt self-executing rules to implement the Act and then to rely in part on private enforcement actions such as the ones involved in the several depreciation cases. *The very justification for a private enforcement statute such as Section 401(b) is that the agency may not have the resources to police every violation*

of its orders and that aggrieved private parties with something at stake can help it with its job."[44]

As the agency charged with administering the Communications Act, the FCC's views are entitled to great weight.[45] Moreover, the FCC's own position that private enforcement of the Preemption Order promotes, rather than impinges, its role in implementing federal communications policy obviously has far greater credibility than the contrary claims of the Maryland PSC and supporting *amici curiae*. It is ironic, to say the least, that those parties should advance the unique role of the FCC in administering and enforcing the Communications Act in support of their effort to *evade* compliance with an FCC ruling aimed at implementing the Communications Act.

The important role served by private enforcement of FCC "orders" pursuant to Section 401(b) is well-illustrated in this case. If the Preemption Order were not enforceable under Section 401(b), all the state commissions could with impunity decline to comply with the Preemption Order's requirements until the FCC commenced and concluded an adjudicatory proceeding as to each. In each such case, the FCC would have to repeat the unequivocal command in the Preemption Order that the state commissions apply the FCC-prescribed depreciation rates in setting charges for intrastate telephone service. The ability of the FCC to commence and conclude such proceedings expeditiously would, of course, be constrained by the FCC's limited resources. But while FCC action was awaited,[46] or while possibly protracted adjudicatory proceedings were pending, C&P and other telephone carriers would continue to suffer irreparable harm, at a rate of $44,000 per day in the immediate case involving C&P. 748 F.2d at 882.[47]

44. Memorandum of Federal Communications Commission as Amicus Curiae in Support of Petition for Rehearing, at 14 (July 27, 1984), *New England Telephone*, *supra* (footnotes omitted) (emphasis added) (hereinafter "FCC *Amicus* Brief").

45. *E.g.*, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .") (footnote omitted); *Investment Company Institute v. Camp*, 401 U.S. 617, 626-27 (1971).

46. As the Fifth Circuit observed in *South Central Bell Telephone Co.*, *supra*, there could be situations "in which only a private party would have a sufficient interest in the obedience of an FCC rule to institute an enforcement proceeding." 744 F.2d at 1118. *See FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 477 (1940) (observing that a person with a financial stake in the granting of a license may be the only one with sufficient interest to seek judicial review).

This inefficient and pointless procedure would not be much improved even if the FCC could, under Section 401(a) of the Communications Act, enforce the Preemption Order in federal court directly against each of the fifty state commissions, as the Maryland PSC and the supporting *amici curiae* claim is possible. (Brief for the Petitioner at 32-34; Brief for Supporting *Amici Curiae* at 8-10.) There still would be appreciable delay in state commissions' compliance with the Preemption Order, and in the interim irreparable harm to private parties such as C&P would continue to accrue.

Moreover, the premise that the FCC could itself enforce the Preemption Order in a mandamus suit under Section 401(a) is extremely dubious: Section 401(a) only provides the district courts with jurisdiction over suits brought by the FCC alleging a violation of *the provisions of the Communications Act itself*, but rulemaking or adjudicatory orders obviously are not provisions of the Communications Act.[48] The difference between violations of

47. This debilitating state of affairs would exist even though the FCC in the Preemption Order required the compliance of the Maryland PSC and all state commissions with FCC-prescribed depreciation rates and policies; and by the Prescription Order proceedings, in which the Maryland PSC participated, the FCC defined the exact depreciation rates and methods which C&P was to follow for intrastate and interstate ratemaking purposes.

48. It does not make sense to treat FCC "regulations" (let alone highly specific FCC rulings such as the Preemption Order) as the functional equivalent of the Communications Act itself, as urged by the Maryland PSC and supporting *amici curiae*. (Brief for the Petitioner at 32; Brief for Supporting *Amici Curiae* at 6.) Under general principles of administrative law, administrative agencies may — pursuant to their delegated rulemaking authority — promulgate regulations or issue rulemaking orders that require conduct beyond that specified in a statute; indeed, that is the very purpose of permitting

the Communications Act and even general FCC rules and regulations is highlighted by other provisions of the Communications Act expressly distinguishing between the two.[49] Accordingly, the import of the Maryland PSC's argument that the Preemption Order is not an "order" for purposes of Section 401(b) is that even the FCC could not enforce it without first concluding an adjudicatory proceeding and entering an adjudicatory order. This is plainly an untenable result.

In contrast to the important role played by private enforcement of the Preemption Order in implementing an important and specific FCC directive, the Court should consider that no unfairness to the Maryland PSC results by virtue of a Section 401(b) suit by C&P to enjoin violation of the Preemption Order, and none is even asserted by the Maryland PSC or the supporting *amici curiae*. The Maryland PSC could have appealed the Preemption Order or the Prescription Orders pursuant to Section 402(a), but chose not to do so; the Maryland PSC had full notice of the Preemption Order, as it was "duly served" upon the Maryland PSC, as required for enforcement of an "order" under Section 401(b); and there is no question that the Maryland PSC has violated the requirements of the Preemption Order.

2. Private Enforcement Does Not Impinge on the FCC's Role in Administering and Enforcing the Communications Act

The Maryland PSC and supporting *amici curiae* contend that the enforcement of FCC rulings such as the Preemption Order by private parties will improperly impinge on the FCC's role in assuring a uniform and consistent interpretation of the Communications Act. (Brief for the Petitioner at 34-39; Brief for

NOTES *(Continued)*

agencies to promulgate regulations. The Maryland PSC concedes as much elsewhere in its brief, stating that "[i]t is through the valid exercise of its rulemaking power that the FCC makes *new law* . . . ." (Brief for the Petitioner at 23) (emphasis added).

49. For instance, the penal provisions of the Communications Act, 47 U.S.C. §§ 501, 502, provide separate penalties for (i) violations of the Act and (ii) violations of FCC rules and regulations.

Supporting *Amici Curiae* at 8-10.) Even if one overlooks the incongruence of this argument — which is made to justify evasion of an FCC ruling intended to mandate uniformity among the states in their use of depreciation rates and methods — it is apparent that none of the suggested "evils" has any substance.

First, the Preemption Order, as noted, was a highly specific ruling that required, in straightforward terms not needing further FCC interpretation, that the Maryland PSC and other state commissions apply the FCC-prescribed depreciation rates and methods in setting charges for intrastate telephone service. This directive was, equally straightforwardly, defied and violated by the Maryland PSC. Accordingly, in this case there was no need for any particular FCC expertise or discretion in determining whether a violation of law had occurred, and hence no need for involving the FCC in an enforcement suit as claimed by the Maryland PSC.[50] (Brief for the Petitioner at 35.)

Second, should difficult questions of federal communications law or policy arise in Section 401(b) suits, there are ample methods for the district courts to obtain the FCC's views. As the FCC has previously explained:

> "If questions of interpretation or basic fact or broad communications policy arise, the enforcing court can and should either refer such questions to the FCC under the doctrine of primary jurisdiction or solicit the FCC's views as an intervenor or as amicus curiae. In this way, the FCC's

50. The Maryland PSC incorrectly suggests that courts have historically declined to enforce imperative and immediately effective FCC rulings like the Preemption Order in suits brought by private parties. (Brief for the Petitioner at 32-33.) Neither of the two cases cited involved attempts by private parties to enforce a particular FCC decision requiring any specific action. In *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 409 F. Supp. 800, 814 (D.P.R. 1975), *aff'd*, 553 F.2d 701 (1st Cir. 1977), the court simply determined that it did not have jurisdiction under Section 401(b) to enforce provisions of the Communications Act itself or *unspecified* FCC "holdings, rulings and policies." Also, in *Kroeger v. Stahl*, 148 F. Supp. 403 (D.N.J.), *aff'd*, 248 F.2d 121 (3d Cir. 1957), the court declined to grant relief upon determining that there was no "order" at all in that the FCC "authorization" at issue "did not direct plaintiff or any one else to do anything." 148 F. Supp. at 406.

> principal role as enforcer of the Communications Act is satisfied, and the district court fulfills the specific role Congress made for it in Section 401(b)." FCC *Amicus* Brief, *supra*, at 15 (footnote omitted).[51]

The possible need in some cases — but not in the case of the Preemption Order — for the agency's special expertise in applying FCC rulemaking orders therefore does not require that such FCC orders be totally unenforceable under Section 401(b).[52]

Third, as a fundamental matter, the federal courts should not be held powerless to enforce an FCC order simply because, as the Maryland PSC and supporting *amici curiae* suggest, there may be some difficulty in determining whether the court's injunction order has been fully complied with or if there has been a violation of the FCC order in the first place. (Brief for the Petitioner at 36-38; Brief for Supporting *Amici Curiae* at 10.) By Section 401(b), Congress expressly granted the federal district courts jurisdiction to enjoin violations of FCC orders, and there is no more cause here than in the case of any FCC order — or any statute — to believe that the district courts will not ably and consistently enforce the law.[53]

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51. In *South Central Bell*, *supra*, the Fifth Circuit similarly observed that "through the use of agency intervention and amicus curiae briefs, as well as through the application of the doctrine of primary jurisdiction, the courts and the FCC should be able to prevent both significant inconsistent applications of FCC rules and serious judicial encroachment upon FCC responsibilities." 744 F.2d at 1118.

52. *See, e.g.*, *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976) (primary jurisdiction referral not required where the "standards to be applied . . . are within the conventional competence of the courts").

53. In fact, in the three cases cited by the Maryland PSC, the district courts appear to have responsibly enforced the Preemption Order as required by Section 401(b). Different evidentiary records were presented in the three cases with respect to whether an adjustment by a state commission in a telephone carrier's rate design and rate of return was designed as a subterfuge to negate the effect of the Preemption Order, and the courts consequently reached different conclusions. *South Central Bell Tel. Co. v. Louisiana Public Service Comm'n*, 57[illegible] F. Supp. 227, 237-38 (M.D. La. 1983) (downward adjustment in return on equity made "in the absence of evidence justifying such an adjustment"), *aff'd*, 744 F.2d 1107 (5th Cir. 1984), *appeal filed*, 53 U.S.L.W. 3449 (U.S. Nov. 30, 1984) (No. 84-870); *New England Tel. & Tel. Co. v. Public Utilities Comm'n of Maine*, 579 F. Supp. 1356, 1362 (D. Me.) (rate design change is not "unsupported by the evidence"), *vacated*, 742 F.2d 1 (1st Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3460 (U.S. Dec. 5, 1984) (No. 84-900); *South Central Bell Tel. Co. v. Kentucky Public Service Comm'n*, Civ. No. 85-02 (E.D. Ky. 1985) (dispute over need for increase in telephone rates in order for carrier to meet the authorized rate of return). Of course, in the case at bar, there were no disputed issues regarding the Maryland PSC's acknowledged violation of the Preemption Order, and it is not alleged that the Maryland PSC failed to comply with the district court's injunction order.

In sum, the enforcement of the Preemption Order in this case does not impinge on the FCC's role in shaping federal communications policy. Just the opposite is the case, as the FCC has noted. Through enforcement of the Preemption Order by C&P, the Maryland PSC was required to comply with an unequivocal FCC ruling served upon the Maryland PSC and intended by the FCC to be binding immediately. It is difficult to conceive of a more appropriate instance for private suit under Section 401(b).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit.

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Dated: October 7, 1985

No. 84-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

1. Although the Respondent concedes that the FCC's "Preemption Order" was the product of an agency rulemaking proceeding (Respondent's Brief, p. 23),[1] The

[1] Specifically, C&P states in its Brief that the Preemption Order was *at least in part* the product of an FCC rulemaking proceeding. It would seem that this statement is based upon the fact that the Preemption Order was issued in a consolidated

Chesapeake and Potomac Telephone Company of Maryland ("C&P" or "Company") nevertheless maintains that this action constitutes an "order" which is enforceable under Section 401(b) of the Communications Act. 47 U.S.C. § 401(b). In this regard, C&P argues that for purposes of the Communications Act,[2] there is no clear distinction between a rule and an order and that the substance of the FCC's action, rather than the nature of the proceedings in which that action was taken, determines whether it can be enforced by a private party under Section 401(b). According to the Respondent, FCC "rulemaking orders", such as the Preemption order which are highly specific in their requirements and which are directed to and served upon named entities, are no different from FCC adjudicatory orders and are therefore enforceable in federal court on behalf of a private party.

proceeding which included consideration of a Petition for Declaratory Ruling filed by General Telephone Company of Ohio ("GTE"). However, to the extent that an FCC declaratory ruling is enforceable on behalf of a private party under Section 401(b), it would only be enforceable against a party to that proceeding (e.g., the Public Utilities Commission of Ohio). *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418 (1942).

[2] The Respondent and its supporting Amici Curiae maintain that the definitions of "rule" and "order" which are contained in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551(4) and 551(6), have no applicability in construing the same words in the Communications Act (Respondent's Brief, p. 22; BOCs' Brief, pp. 10-11). However, while these definitions are not dispositive of the construction to be accorded to the same words in previously enacted legislation, the provisions of the APA were largely declarative of pre-existing law and can be used in interpreting the Communications Act. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 5 (1st Cir. 1984). In fact, the FCC uses the provisions of the APA to support its argument that its ruling on GTE's Petition for Declaratory Ruling has "like effect as in the case of other orders". 5 U.S.C. § 554(e) (FCC Brief, pp. 21-22, n. 21).

Initially, it should be noted that the Petitioner agrees that it is the substance of the FCC's action and not the particular label placed upon it by the FCC or the nature of the proceedings[3] which determines whether or not that action can be enforced by a private party under Section 401(b). Moreover, it is also apparent, as the Respondent and the Bell Operating Companies ("BOCs") admit, that not all FCC actions are enforceable on behalf of private parties under Section 401(b).[4] Under the enforcement scheme established by Congress, FCC actions which are self-executing and specific in their requirements (i.e., determine the specific rights and obligations of the parties before the FCC) are deemed to be "orders" and are enforceable under that subsection, while other actions such as the adoption of generalized rules of conduct or statements of policy which are uniformly and prospec-

[3] Contrary to the Respondent's argument, the nature of the proceeding does affect the substance of the agency's action. For example, in order for the agency's action to be specific in its requirements and self-executing, it is necessary for the agency to consider specific actions which are taken by specific individuals. In the proceedings which culminated in the Preemption Order, the FCC did not consider whether or not the specific act of a specific state commission (with the possible exception of the Public Utilities Commission of Ohio) constituted a violation of the Communications Act or FCC policies. As the FCC stated "a case or controversy in a judicial sense is not required" in order to permit the issuance of the Preemption Order (Pet. App. 60a).

[4] The Respondent implies that certain FCC rules which are general in their terms and applicability may not be enforceable by private parties under Section 401(b) (Respondent's Brief, p. 26). The BOCs state that based upon consideration of such factors as finality, clarity and injury, certain agency orders may not be the appropriate subject for immediate court enforcement (BOCs' Brief, p. 16). Clearly, if FCC "rulemaking orders" which are the functional equivalent of provisions of the Act are enforceable under Section 401(b), then the rights and responsibilities which are accorded to the FCC under Section 401(a) are without meaning. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 5 (1st Cir. 1984).

tively applicable to an entire class are not subject to such enforcement proceedings. Consequently, the Respondent, rather than arguing that "rules" are subject to Section 401(b) enforcement proceedings, has attempted to establish that the Preemption Order is, despite its origin, a self-executing FCC "order" and not a "rule" which requires further action by the FCC before it can be enforced by a private party under the enforcement scheme established by Congress in Section 401.[5] A review of the substance of the Preemption Order and the proceedings which have been instituted to enforce that agency action clearly demonstrate, however, that the Preemption Order is not the kind of self-executing FCC order which Congress intended to be subject to Section 401(b) enforcement proceedings.

In its Memorandum Opinion and Order, the FCC stated that it was necessary to issue a declaratory ruling in order "to clarify for the state commissions and the carriers the effect of our depreciation prescriptions" (Pet. App. 60a). Specifically, the FCC concluded that Section 220(b) of the Communications Act, as well as certain FCC policies, preempted the adoption of inconsistent state depreciation practices (Pet. App. 48a and 56a). As a result, state commissions, in establishing intrastate telephone rates, were precluded from departing from the depreciation methods prescribed by the FCC (Pet. App. 61a). However,

[5] Respondent attempts to blur the enforcement scheme established by Congress under Section 401 by arguing that the Preemption Order, while concededly a rulemaking order, is nevertheless enforceable under Section 401(b) because it is "regularly made and duly served" and is "self-executing" (Respondent's Brief, p. 26). However, rules, whether they are adopted through adjudicatory or rulemaking procedures, are not binding on parties whose rights and obligations have not been specifically adjudicated by the agency. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 (1969). The rights and obligations of the Md. PSC with respect to the Preemption Order have never been adjudicated by the FCC.

the FCC failed to specify what it considered to be an inconsistent depreciation practice or a departure from its prescribed methods. Moreover, as the FCC recognized in its Preemption Order, the setting of depreciation rates only resolves one issue impacting the ratemaking process (Pet. App. 55a). There are numerous other interrelated issues which must also be resolved before specific rates can be established by a state commission. Consequently, in order to determine whether or not an intrastate rate order violates the Preemption Order, a detailed analysis must be made of the state commission's decision-making process. Such an analysis has been made or is in the process of being made by at least three separate District Courts. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 579 F. Supp. 1356 (1984); *South Central Bell Telephone Co. v. Kentucky Public Service Commission*, Civil Action No. 85-02 (E.D. Ky. 1985); *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 570 F. Supp. 227 (M.D. La. 1983).[6] A review of the proceedings in these courts clearly establishes that the Preemption Order is not a highly specific, self-executing order;[7] further determinations are

[6] Respondent asserts that while the question of whether a state commission has complied with the FCC's Preemption Order may have arisen in other jurisdictions, this issue did not arise in the proceedings below. However, following the issuance of the Preliminary Injunction by the District Court, similar issues were raised by certain parties and considered by the Md. PSC in implementing the District Court's Order. Although the rates proposed by C&P were ultimately authorized by a majority of the Commissioners, it is apparent from a review of the Commission's Opinion that the Md. PSC did not fully agree with C&P's position that compliance with the FCC's Preemption Order prohibited adjustments to other components of the ratemaking process. *Re The Chesapeake and Potomac Telephone Company of Maryland*, Case No. 7661, Order No. 66177, pp. 5-6 (Md. Pub. Serv. Comm'n, April 15, 1983).

[7] The role played by these courts in the three enforcement proceedings is also inconsistent with the FCC's assertion that the District Court has a "narrow function" in Section 401(b) proceedings (FCC Brief, p. 25).

required on the part of the FCC before that "order" can properly be enforced against a state commission.

2. The Respondent and its supporting Amici Curiae concede that there will be occasions when the enforcement of the Preemption Order will require the FCC's participation in District Court proceedings (Respondent's Brief, pp. 31-32; BOCs' Brief, pp. 14-15; FCC's Brief, pp. 25-26). Since difficult questions of federal communications law or policy can be referred to the FCC under the doctrine of primary jurisdiction or addressed by the FCC through that agency's intervention in the District Court proceedings, private enforcement of the Preemption Order will not, these parties contend, impinge upon the FCC's role as the party principally responsible for enforcement of the Communications Act nor will it inhibit the development of a uniform, national telecommunications policy.

Although some degree of uniformity could perhaps be achieved through FCC participation in proceedings which are instituted by private parties to enforce the Preemption Order, the use of such a procedure does not assure development of a consistent policy with respect to the implementation of that Order in intrastate telephone ratemaking orders. In this regard, it is apparent that the existence of the procedures suggested by the Respondent did not prevent the District Courts in Louisiana and Maine from enforcing the Preemption Order in an inconsistent manner and thereby precluding the implementation of a uniform depreciation policy. Inconsistent enforcement of the Preemption Order will occur despite the availability of these procedures for a number of reasons. For example, the parties to a particular enforcement proceeding and the District Court may not choose to involve the FCC in those proceedings; the FCC did not participate in the District Court proceedings which were conducted with respect to the Md. PSC's ratemaking

order. Consequently, the decision of the District Court in a private party adjudication may not be consistent with FCC policies. Moreover, in view of the FCC's allegedly limited resources, active participation by that agency in various enforcement proceedings which are instituted by private parties may not be feasible.[8] Therefore, the mere possibility that the FCC may participate in District Court proceedings is not sufficient to ensure that the Preemption Order will be enforced in a uniform manner. If the goal of promoting the development of a uniform nationwide interstate communications policy permits the FCC to issue its Preemption Order, then that goal also dictates that Section 401(b) not be made available to private parties to enforce that "order". Private party enforcement of the Preemption Order should not be permitted since it would artificially fragment the FCC's enforcement powers and thereby frustrate the development of a comprehensive, consistent and uniform regulatory scheme. *General Telephone Co. v. FCC,* 413 F.2d 390, 402 (1969), *cert. denied* 396 U.S. 888 (1969).

[8] In support of its contention that private party enforcement of the Preemption Order should be permitted under Section 401(b), the FCC argues that an agency may not have the resources to police violations of such "orders" (FCC's Brief, p. 25). In view of the FCC's argument that a uniform and consistent communications policy can be achieved through its participation in District Court enforcement proceedings, it is difficult to comprehend how the FCC's resources will be conserved by permitting private parties to enforce the Preemption Order under Section 401(b); conceivably, the FCC could be an unwilling participant in numerous enforcement proceedings which are instituted by parties seeking to promote private interests rather than the public interest which is presumably embodied in the policies adopted by the FCC. *Hallie v. Eau Claire,* 105 S. Ct. 1713, 1720 (1985). It would appear that the FCC's resources can only be conserved by providing it with the sole authority to determine whether the circumstances of a particular case warrant the institution of enforcement proceedings.

To accept the Respondent's broad construction of the word "order" as it is used in Section 401(b) will also have the undesirable effect of increasing the role of District Courts in enforcement proceedings under the Communications Act.[9] In this regard, it is apparent that by making an FCC adjudication as to whether the specific acts of a specific party are in violation of its Preemption Order a prerequisite to private enforcement under Section 401(b), the number of enforcement cases will in all likelihood be reduced. Moreover, in the cases which do reach the federal courts, the FCC's order will be narrowly focused and applicable to specific parties. As a result, courts will not be required to delve into state ratemaking matters or seek further imput from the FCC. Furthermore, an FCC adjudication will eliminate the need for federal courts to fashion judicial remedies which parallel statutory remedies in order to preserve the due process rights of persons lacking actual notice of an FCC rulemaking order. *See* Justice Powell's concurring opinion in *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 289-91 (1978).

In sum, a narrow construction of the word "order" will produce an enforcement scheme in Section 401 which will ensure that the FCC, not private litigants, remains the "champion" of the Act[10] and will lessen the amount and extent of litigation in the federal courts.

[9] It would seem that the FCC has taken the position that in view of its limited resources, it is better to rely on the resources which are available in the federal courts.

[10] *Lechtner v. Brownyard,* 679 F.2d 322, 327 (3d Cir. 1982) and *Massachusetts Universalist Convention v. Hildreth & Rogers Co.,* 183 F.2d 497, 500 (1st Cir. 1950). Contrary to the enforcement scheme suggested by the Respondent and its supporting Amici Curiae, there is nothing in the Act or its legislative history to support the "deputizing" of private parties to enforce quasi-legislative "orders" of the FCC.

3. The Respondent and the BOCs maintain that unless FCC "rulemaking orders" such as the Preemption Order are enforceable under Section 401(b), there may be no statutory provision for the enforcement of this class of agency action (Respondent's Brief, p. 29; BOCs' Brief, p. 12). In this regard, they contend that Section 401(a), 47 U.S.C. § 401(a), only provides for court enforcement of the Communications Act and that not all violations of FCC rules constitute a violation of the Act. As a result, a narrow construction of the word "order" will open a gap in the Congressional enforcement scheme.

With respect to this argument, it should first be noted that the Respondent and its supporting Amici Curiae have failed to provide one example of a violation of an FCC rule which could not be the subject of an FCC enforcement action under Section 401(a).[11] Moreover, since the FCC predicated its Preemption Order at least in part on its determination that the Communications Act preempted inconsistent state depreciation practices, it is apparent that that "rulemaking order" could be enforced under Section 401(a). However, even if one assumes that not all FCC rulemaking orders are enforceable under Section 401(a), violations of such orders can easily be enjoined under Section 401(b) following the requisite FCC determination, embodied in an "order", that the specific act of a

[11] The Respondent and the FCC assert that a violation of a telephone company tariff regulation is not a violation of any provision of the Act (Respondent's Brief, p. 26, n. 43; FCC's Brief, pp. 19-20, n. 18). However, under Section 201(b) of the Act, 47 U.S.C. § 201(b), it is unlawful to charge a rate which is unjust or unreasonable and under Section 205 of the Act, 47 U.S.C. § 205, the FCC has the authority to prescribe just and reasonable rates. A violation of a just and reasonable tariff provision as established by the FCC in a "rulemaking order" can be considered, therefore, to be a violation of the Act. Consequently, the Respondent's contention that the suit which was the subject of this Court's decision in *Ambassador, Inc. v. United States,* 325 U.S. 317 (1945) could not have been brought under Section 401(a) is without merit.

specific person violated a particular "rulemaking order". Contrary to the assertions of the Respondent and the FCC, such a procedure is neither redundant nor time consuming (when compared to the proceedings which have been conducted in the several District Courts), but is necessary in order to ensure that the FCC discharges the responsibilities which have been conferred upon it by Congress.

4. Relying largely on this Court's decision in *Columbia Broadcasting System v. United States,* 316 U.S. 407 (1942), the Respondent argues that consistency requires that FCC actions which are reviewable "orders" for purposes of Section 402 are also enforceable "orders" for purposes of Section 401 (Respondent's Brief, p. 26). However, since the quasi-legislative rulemaking order at issue here is both reviewable and enforceable (the Preemption Order is reviewable by all parties under Section 402(a) and enforceable by the FCC under Section 401(a)), there is no inconsistency between the enforcement and judicial review provisions of the Communications Act.

In general, the Respondent's reliance on *CBS* to support its argument is misplaced. For reasons which were noted in our opening Brief, the "exceptional" nature of that case required that the term "order" be construed to include quasi-legislative regulations for purposes of allowing judicial review under Section 402(a). Here, no exceptional circumstances exist which require a similar broad construction of that word for purposes of allowing private party enforcement of quasi-legislative "rulemaking orders".

5. C&P implies in its Brief that since the Petitioner participated in certain proceedings which were instituted by the FCC for the purpose of prescribing depreciation rates for the Company, the Md. PSC is bound by the Preemption Order which purportedly requires the Petitioner to use those rates for intrastate ratemaking

(Respondent's Brief, p. 20, n. 31). However, while the Md. PSC submitted comments in certain prescription proceedings, it did not participate or become a party to the proceedings which culminated in the Preemption Order. It should also be noted that at the time the Md. PSC submitted its comments, the FCC was of the opinion that the Communications Act and agency policies did not preempt inconsistent state depreciation practices. *Amendment of Part 31,* 89 FCC2d 1094 (1982). Consequently, although the FCC did not adopt the recommendations of the Md. PSC, there was little reason to appeal the Prescription Orders under Section 402(a). Similarly, since the Md. PSC was not a party to the proceedings which produced the Preemption Order, and since certain state commissions who participated in these proceedings were adequately representing its interests, there was no need for the Md. PSC to join in the appeal of that "rulemaking order".

6. The Petitioner's primary argument is that the term "order" as used in Section 401(b) does not encompass a rulemaking order. The broader issue of whether a state commission is a "person" under Section 401 need not be reached should the Court agree with our primary argument. However, should the Court reach this issue, the Petitioner rests on the arguments contained in its opening brief.

CONCLUSION

For the reasons stated here and in our opening Brief, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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(4)

No. 84-1362

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,
vs.
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT BRIEF OF STATE REGULATORY COMMISSIONS OR THEIR REPRESENTATIVES, STATES, STATE AGENCIES, AND RATEPAYER CONSUMER ADVOCATES AS AMICI CURIAE URGING REVERSAL

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JOINT BRIEF OF STATE REGULATORY COMMISSIONS OR THEIR REPRESENTATIVES, STATES, STATE AGENCIES, AND RATEPAYER CONSUMER ADVOCATES AS AMICI CURIAE URGING REVERSAL

Amici curiae—consisting of state regulatory commissions or their representatives from the states of California, Alabama, Arkansas, Connecticut, Florida, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, New Jersey, Ohio, Washington, West Virginia and Wisconsin; the Public Service Commission of the District of Columbia; the states of California and Michigan; ratepayer consumer advocates representing the National Association of State Utility Consumer Advocates ('NASUCA") and the states of Florida, Ohio, Maryland, Minnesota and South Carolina; and the National Association of Regulatory Utility Commissioners ("NARUC")—hereby submit their brief in support of Petitioner, Public Service Commission of Maryland. For the reasons set forth below, the United States Court of Appeals for the Fourth Circuit in *Chesapeake & Potomac Tel. Co. of Maryland v. Pub. Serv. Comm'n of Maryland*, 748 F.2d 879 (1984), erred in affirming the District Court's order.

Pursuant to Rule 36.2 of this Court, *Amici* have obtained the written consent of all parties to this case and filed them with the Clerk of the Court.

INTEREST OF AMICI CURIAE

Amici are state regulatory commissions or their representatives; and states, state agencies or ratepayer consumer advocates which regularly appear before state and federal regulatory commissions. Specifically, the California Public Utilities Commission, the Alabama Public Service Commission, the Arkansas Public Service Commission, the Department of Public Utility Control/State of Connecticut, the Florida Public Service Commission, the Iowa State Commerce Commission, the Kansas State Corporation Commission, the Kentucky Public Service Commission, the Louisiana Public Service Commission, the Public Utilities Commission of Maine, the Michigan Public Service Commission, the New Jersey Board of Public Utilities, the Public Utilities Commission of Ohio, the Washington Utilities and Transportation Commission, the Public Service Commission of West Virginia, and the Wisconsin Public Service Commission are administrative agencies established under the constitution and laws of their respective states. The Public Service Commission of the District of Columbia is an administrative agency established under the laws of the district. Among their other duties, these agencies regulate the intrastate rates and services of telecommunication service providers operating within their jurisdictions.

The Minnesota Department of Public Service is an independent agency whose purpose is to represent the interests of all residential and business classes of customers in the State of Minnesota in proceedings involving telephone matters.

The Public Counsel of the State of Florida, the Office of the Ohio Consumers' Counsel, the Maryland People's Counsel, and the Consumer Advocate for the State of South Carolina regularly appear before state and federal regulatory commissions on behalf of consumers in public utility proceedings.

NASUCA is a national organization whose membership consists of thirty-six state public utility consumer advocates, including independent state agencies, sections of state attorney generals' offices, and a citizens' utility board.

NARUC is a quasi-governmental nonprofit organization of state officials charged with the duty of regulating telecommunications within their respective jurisdictions. Within its membership are the governmental bodies of the fifty states, and the District of Columbia, the Virgin Islands and Puerto Rico.

Amici have a vital interest in ensuring consistency and certainty in the interpretation, application and enforcement of validly adopted rulemaking orders of the Federal Communications Commission, and in preserving their limited resources devoted to intrastate regulation by avoiding the necessity of defending piecemeal numerous private enforcement actions within their jurisdictions and throughout the nation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The specific rulemaking order of the Federal Communications Commission ("FCC") which Respondent seeks to enforce is the *Memorandum Opinion and Order*, CC Docket No. 79-105, RM-3017, Adopted Dec. 22, 1982, Released Jan. 6, 1983 ("Preemption Order"), which concludes that Congress intended to preempt state depreciation charges and accounting classifications which are inconsistent with federal charges and classifications. *Amici* take the position that this order is invalid because it exceeds the jurisdiction of the FCC as conferred by Congress, and intrudes impermissibly into the sphere of state authority over depreciation of intrastate telecommunications assets, which authority Congress specifically reserved to the states.

The question of the substantive validity of the FCC Preemption Order is pending before this Court in the companion cases of *Louisiana Public Service Commission v. Federal Communications Commission, et al.*, No. 84-871; *People of the State of California and Public Utilities Commission of the State of California, et al. v. Federal Communications Commission, et al.*, No. 84-889; *Public Utilities Commission of Ohio, et al. v. Federal Communications Commission, et al.*, No. 84-1054; and *Florida Public Service Commission v. Federal Communications Commis-*

sion, et al., No. 84-1069. Should the Court reverse the order of the U.S. Court of Appeals for the Fourth Circuit in those cases and thereby invalidate the FCC Preemption Order which is the subject of both Fourth Circuit decisions, then the instant case should be deemed moot. However, should the Court affirm the order of the Fourth Circuit in the above cases and thereby uphold the FCC Preemption Order, it should then reach the merits of the instant case and conclude that Congress conferred authority only on the FCC itself, and not private parties, to enforce the FCC's validly adopted rulemaking orders.

Amici contend in this case that the term "order" as used in Section 401(b)[1] of the Communications Act of 1934, as amended, 47 U.S.C. § 401(b) ("Act"), was not intended by Congress to encompass a rulemaking order of the FCC, and hence, that such order is not subject to enforcement by a private party in a civil action.[2] The term "order" in Section 401(b) must be narrowly construed to mean an adjudicatory order, and not a rulemaking order.[3] Any other construction of that section is inconsistent with

[1] Section 401(b) provides in pertinent part:

If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order.

[2] Whether a state regulatory commission can be deemed a "person" within the meaning of Sections 401(a) and 401(b) is addressed in Petitioner's brief. However, that issue need not be reached if the Court concludes that the "orders" enforceable by a private party under Section 401(b) do not extend to rulemaking orders.

[3] In *New England Tel. & Tel. Co. v. Pub. Util. Comm'n of Maine*, 742 F.2d 1 (1st Cir. 1984), *pet. for cert. filed*, 53 U.S.L.W. 3460 (U.S. Dec. 5, 1984) (No. 84-900), the Court discusses the language and history of Section 401(b) and concludes that the term "order" as used in that section must be restricted to an adjudicatory order. In addition, a federal district court in Maine concluded, based on the history of Section 401(b), that a declaratory order is similarly not an "order" within the meaning of Section 401(b). *See, e.g., New England Tel. & Tel. Co. v. Pub. Util. Comm'n of Maine*, 565 F.Supp. 949 (D. Maine 1983).

(Footnote continued on following page)

congressional intent for two reasons: (1) Congress could only have intended to confer on the FCC the sole authority to enforce its quasi-legislative rulemaking orders because such orders are the functional equivalent of the provisions of the Act itself which the FCC alone enforces; and (2) the fundamental goals of consistency and judicial efficiency in the administration of the Act and in the resolution of disputes arising therefrom are served only if the FCC is given exclusive authority to enforce its rulemaking orders.

ARGUMENT

I. The FCC's Exclusive Authority to Enforce Its Rulemaking Orders Is Necessary for the Same Reasons As Its Exclusive Authority to Enforce the Act Itself

There is no dispute that the FCC, and not private parties, has exclusive responsibility for enforcement of the Act itself under Sections[4] 401(a) and 403.[5] *Massachusetts Universalist Conven-*

The sections of the Interstate Commerce Act upon which Sections 401(a) and 401(b) are modeled have since been repealed and recodified without substantive change into 49 U.S.C. §§ 11703(a) and 11705(a). Congress has clarified that the Interstate Commerce Commission may enforce a "regulation" under Section 11703(a) (formerly, Section 20(9) upon which Section 401(a) is modeled). A private party, however, may only enforce an "order" under Section 11705(a) (formerly, Section 16(12) upon which Section 401(b) is modeled).

[4] Unless otherwise indicated, all statutory references are to Title 47 of the United States Code.

[5] Section 401(a) provides:

(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

Section 403 provides:

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter or

tion v. Hildreth & Rogers Co., 183 F.2d 497, 500 (1st Cir. 1950); *Lechtner v. Brownyard*, 679 F.2d 322, 327 (3rd Cir. 1982); *McIntire v. Wm. Penn Broadcasting Co. of Philadelphia*, 151 F.2d 597, 600 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). The dispute is whether the FCC's rulemaking orders fall outside those "orders" which a private party may enforce under Section 401(b), and hence, can only be enforced by the FCC under Sections 401(a) and 403.

Because the FCC's rulemaking orders are the functional equivalent of the provisions of the Act itself, Congress could only have intended to confer exclusive responsibility on the FCC to enforce such orders. Unlike an adjudicatory order which determines the rights of and binds private parties in a particular proceeding, *Columbia Broadcasting Co. v. United States*, 316 U.S. 407 (1942), a rulemaking order is quasi-legislative, and uniformly and prospectively applicable to an entire industry or affected class. *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). Its purpose is to "[fill] in the interstices of the Act," *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947), and thereby become "the source of law that the court and agency must enforce." *American Trucking Ass'n v. United States*, 688 F.2d 1337, 1341 (11th Cir. 1982), *rev'd on other grounds*, *ICC v. American Trucking Ass'n*, ____ U.S. ____, 104 S.Ct. 2458 (1984); *see also Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); *Atchison, Topeka & Santa Fe Ry. v. Scarlett*, 300 U.S. 471, 474 (1937). Accordingly, the FCC must have exclusive responsibility to enforce its rulemaking orders, just as it enforces

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concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

the provisions of the Act itself, under Sections 401(a) and 403.[6] No other construction is consistent with congressional intent.

II. The Fundamental Goals of Consistency and Judicial Efficiency Which Underlie the Communications Act Are Served Only if the FCC Has Sole Discretion to Enforce Its Rulemaking Orders.

The fundamental goals of consistency and judicial efficiency which Congress sought to attain by enacting the Communications Act can only be served by vesting exclusive authority in the FCC under Sections 401(a) and 403 to enforce its validly adopted rulemaking orders. In contrast, private party enforcement of such orders under Section 401(b) would invite inconsistency and inefficiency.

In enacting the Communications Act, Congress set forth three basic policies: (1) to achieve a unified and coherent interstate communications policy; (2) to centralize authority in a single body to effectuate this policy; and (3) to entrust enforcement of the Act to the FCC exclusively to administer this policy. Section 151.[7] Each of these policies, individually and together, reflects Congress' intention that interstate communications policy be consistent in its interpretation, application and enforcement, and that disputes arising under the Act be efficiently resolved by the FCC in the first instance and not the courts. Precluding private party enforcement of FCC rulemaking orders under Section

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[6] The very rulemaking order which is the subject of the instant enforcement action aptly demonstrates the close similarity between a rulemaking order and a provision of the Act. Assuming *arguendo* the validity of this order, the FCC bases its preemption theory primarily on Section 220 of the Act. Enforcement of the order thus requires enforcement of Section 220 itself, which only the FCC may pursue.

[7] Two other policies, promotion of national defense and safety of life and property, have little if any relevance to this case. In any event rulemaking orders which further these policies would be enforceable solely at the discretion of the FCC, as discussed herein.

Congress has also reserved the regulation of intrastate communication service exclusively to the states under Sections 152(b) and 221(b).

401(b) is the only construction of that section which satisfies congressional intent.

A. Reserving Enforcement of Rulemaking Orders Exclusively to the FCC Promotes Soundness and Consistency in the FCC's Adopted Policies

By giving the FCC sole discretion to determine whether and to what extent it should enforce its validly promulgated rulemaking orders, Congress sought to enable the FCC to assure the soundness and consistency of its orders in adopting a unified and coherent interstate communications policy. A construction of the Act which permits private party enforcement of rulemaking orders would thwart the FCC's ability to achieve these goals.

The decision to enforce a given rulemaking order necessarily involves a complicated balancing of a number of factors which are peculiarly within the expertise of the FCC. The FCC itself, and not a private party who stands to benefit from enforcement, is most competent to make a threshold determination of whether a violation has in fact occurred. Likewise, the FCC is most capable of deciding whether enforcement is likely to further its overall policies and the broad public interest which it is mandated to protect. *Cf. Town of Hallie v. City of Eau Claire,* 471 U.S.____, 85 L.Ed.2d 24, 34, 105 S.Ct. 1713, 1720 (Mar. 27, 1985) ("Where a private party [acts], there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.")

If an enforcement proceeding is warranted, the FCC is similarly in the best position to ascertain whether the theory underlying the rule can reasonably and fairly be translated into actual practice in a given situation. Application of a particular rule, for example, may indicate that the theory is unsound in some circumstances or that the rule is flawed or impractical in some material sense. Likewise, the FCC may find that the rule can be interpreted in unintended ways or have unintended effects. The FCC may also find that the rule does not address a specific concern, or that it fails to apply to a particular situation or to specific classes of persons. Alternatively, the FCC may wish to carve out an exception to the rule for certain classes of persons or

for unique circumstances. In short, in an enforcement proceeding, the FCC is given the flexibility and discretion to clarify, modify, or even rescind the rule.[8] None of these options for crafting sound and consistent interstate communications policy is available if a private party is permitted to enforce a rulemaking order under Section 401(b).[9]

Furthermore, the practical consequence of permitting private party enforcement, in the absence of FCC intervention, is to transfer the responsibility for interpreting and applying the FCC rule or standard from a single expert agency to a district court.[10] Not only is this contrary to the express policy of Congress to centralize authority in the FCC, but such action invites the real possibility of misinterpretation or misapplication of FCC policy. The number of inconsistent interpretations or applications may be greatly compounded if private parties decide to sue in any of the

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[8] This flexibility and discretion in an enforcement proceeding is consistent with the FCC's continuing jurisdiction under Section 416 to modify or suspend its rulemaking orders at any time upon proper notice and procedure.

[9] Although it may be argued that the FCC could conceivably intervene in numerous private enforcement actions, allowing such actions necessarily deprives the FCC from making the determination whether enforcement is even warranted in the first place. Moreover, through intervention, the FCC may find itself defending against numerous and improper interpretations or applications of its rulemaking order by private parties who seek to further their own, and not the public interest. Since courts accord considerable deference to the agency's own interpretation and application of its orders, *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), it is appropriate to let the FCC alone initiate enforcement actions. Moreover, in the event that numerous enforcement actions are warranted, reserving enforcement of FCC rulemaking orders to the FCC alone permits the FCC to initiate its own proceedings pursuant to Section 403 and thereby conserve its limited resources.

[10] This is not to suggest that a district court's authority is simply ministerial. Even in an enforcement action brought by the FCC, a district court would clearly retain the authority to refuse to enforce a given rulemaking order against a particular person if the order on its face did not support the specific enforcement action against such person.

700 district courts. Private enforcement actions thus may undermine the unified and coherent interstate communications policy which Congress sought to achieve.[11]

Enforcement of FCC rulemaking orders by a regulated entity against state regulatory commissions is particularly troublesome. Assuming *arguendo* that state commissions are even subject to FCC rulemaking orders, they must have consistent and certain guidance from the FCC regarding the interpretation and application of such orders. If private parties are allowed to sue state commissions in numerous federal district courts in piecemeal fashion, leading to varying and potentially inconsistent analyses of a valid FCC rulemaking order, state commissions will be faced with great uncertainty in deciding how to achieve compliance with the order.[12]

In addition, the necessity for a state commission to defend one or several federal court actions will siphon off already strained resources, which otherwise would be devoted to the regulation of intrastate rates and services, and could well result in significant interference with intrastate ratemaking processes. The FCC, and not private parties, is in the best position to assess the benefits of enforcement in relation to the burdens on all parties created by such action.

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[11] The important interests of uniformity and coordination in the administration of complex regulatory statutes underlying the doctrine of primary jurisdiction are the same interests which *amici's* construction of Section 401(b) advances. *United States v. Western Pacific R.R.*, 352 U.S. 59, 64-65 (1956); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970).

[12] For example, a federal district court in Louisiana not only enjoined the state commission to comply with the FCC Preemption Order, it also prohibited the state commission from making an offsetting rate adjustment to reflect the lower financial risk associated with adopting the FCC's depreciation methods. *Louisiana Pub. Serv. Comm'n v. South Central Bell Tel. Co.*, 570 F.Supp. 227 (M.D. La. 1983). In contrast, a federal district court in Maine allowed the state commission to make such an offsetting adjustment. *New England Tel. & Tel. Co. v. Pub. Util. Comm'n of Maine*, 579 F.Supp. 1356 (D. Maine 1984).

B. Reserving Enforcement of Rulemaking Orders Exclusively to the FCC Promotes Judicial Efficiency

The goal of judicial efficiency is served if disputes arising from the administration of the Act are resolved in the first instance by the FCC and not the courts.

First, private enforcement under Section 401(b) of a rulemaking order may lead to the premature or unnecessary use of judicial resources by depriving the FCC of the opportunity to determine in the first instance whether it is in the public interest to enforce an order whose validity has been seriously questioned and which will likely be challenged in the appellate courts. In such an instance, the FCC may well choose to defer enforcement or alter the substance of its order in some material respect, thereby obviating the necessity for a court to consider the claim.

In addition, the unnecessary expenditure of judicial resources may be required to preserve the due process rights of persons not parties to and lacking actual notice of an FCC rulemaking order,[13] notwithstanding the availability of statutory procedures to protect these rights. Specifically, under the Communications Act, when a person not a party to a rulemaking order learns that he is subject to the rule, he has several options available to him if he desires to challenge the rule. He may petition for reconsideration of the rule before the FCC under Section 405. If he is unsuccessful, he may then seek appellate review of an adverse order under Section 402. Additionally, he may seek a declaration of his rights from the FCC, or petition the FCC to repeal or waive the rule pursuant to 47 C.F.R. §§ 1.2 and 1.401(a), respectively.

These remedies not only allow the FCC to determine in the first instance whether the rulemaking order should be enforced against such a person, but also afford the person actual notice and an opportunity to be heard by the agency before enforcement is

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[13] Not infrequently rules are adopted and made applicable to persons who lack actual notice of such effect. This is not surprising given the numerous notice of rules published in the Federal Register.

sought.[14] However, a private party's forging ahead to enforce the rulemaking order in federal court may deprive such person of these remedies, and thereby needlessly compel the courts to fashion judicial remedies to protect the person's due process rights.[15] The interest of efficient administration of justice will thus be undercut if a private party is allowed under Section 401(b) to enforce a quasi-legislative rulemaking order.

A private party who is aggrieved by the failure of a person to comply with an FCC rulemaking order, however, is not without a remedy if the FCC is given exclusive authority to enforce such orders. Such a party may seek enforcement of the order before the FCC itself under Section 403 and thus spare the use of judicial resources. Alternatively, such party may request that the FCC institute a civil action under Section 401(a). In either case, the private party has a forum to assert and protect its interests.

Second, private enforcement of the FCC's rulemaking orders may lead to litigation of one case in two separate forums, and thereby create unnecessary procedural and substantive complexity with resultant delay and expense. For example, in *New England Tel. & Tel. Co. v. Pub. Util. Comm'n of Maine, supra,* n.3, the telephone company challenged several aspects of a decision issued by the state regulatory commission in state court. However, the company specifically severed the issue of depreciation expense and instead pursued this issue in federal district court by seeking

[14] Moreover, considerations of fairness require that the person against whom enforcement is sought have the benefit of the FCC's own interpretation and application of its rule to his particular situation. The opinion of a private party whose own interests will undoubtedly color its interpretation, or the decision of a court which lacks the resources to deal with often complex variables underlying the rulemaking order, cannot adequately substitute for the expert judgment of the FCC.

[15] This problem does not arise if private party enforcement is limited under Section 401(b) to enforcement of adjudicatory orders. Unlike a rulemaking order, where a valid adjudicatory order has been issued, a person against whom enforcement is sought has been given actual notice and an opportunity to challenge the proposed action before the FCC and the U.S. Court of Appeals.

to enforce the FCC Preemption Order against the state commission. As the First Circuit recognized, the state court could well have been left with determining the validity of a rate order which critically depended in part on the resolution of the depreciation issue which was not before it. And the federal district court would have been compelled to evaluate compliance with the FCC Preemption Order in a virtual ratemaking vacuum. The First Circuit instead chose not to allow private party enforcement of the FCC rulemaking order.

Third, private enforcement of a rulemaking order may cause a federal district court to delve unnecessarily into state administrative processes.[16] For example, in *South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 744 F.2d 1107 (5th Cir. 1984), *appeal filed,* 53 U.S.L.W. 3449 (U.S. Nov. 30, 1984) (No. 84-870), the district court required the state regulatory commission to raise the telephone utility's allowable rate of return and thereby increase rates by some $40.5 million in order to exact what it thought to be compliance with the FCC Preemption Order. The actual scope of the district court's power had thus arguably extended well beyond simple enforcement of the FCC order and into the domain of the intrastate ratemaking process.[17] Such

[16] Such action, moreover, thwarts the intent if not the letter of the Johnson Act, 28 U.S.C. § 1342, whereby Congress intended that intrastate ratemaking issues should be resolved in state administrative agencies and state courts.

[17] A potentially more serious intrusion into state ratemaking processes is demonstrated by a federal district court enforcement action in Kentucky. There South Central Bell Telephone Company has alleged that the Kentucky Public Service Commission has failed to comply with the FCC Preemption Order, notwithstanding the Kentucky Commission's assertion to the contrary. The utility concedes that the state commission has applied the depreciation methods prescribed by the FCC. Indeed, the Kentucky Commission allowed the utility to use those methods before the FCC mandated their adoption. As a factual matter, the Kentucky Commission has also granted $9.7 million in additional revenue in the past to cover increased depreciation expense which resulted from the use of those methods. Nonetheless, the utility claims that it deserves another $7 million in annual revenues to cover increased

intrusion need not occur at all if private enforcement is precluded under Section 401(b).

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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depreciation expense resulting from the use of the FCC depreciation methods. The state commission rejected that claim on the basis that the utility can absorb this expense while at the same time realizing its authorized rate of return. The federal district court is thus being asked to determine if the actual rates authorized by the state commission reflect compliance with the FCC Preemption Order. *South Central Bell Tel. Co. v. Kentucky Pub. Serv. Comm'n*, Civ. No. 85-02 (E.D. Kent. 1985). *See also* n.16, *supra*.

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No. 84-1362

In the Supreme Court of the United States

OCTOBER TERM, 1985

PUBLIC SERVICE COMMISSION OF MARYLAND, PETITIONER

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a state regulatory commission or its individual members are "persons" under 47 U.S.C. 401(b), which provides for enforcement of orders of the Federal Communcations Commission against "any person."

2. Whether an order issued by the Federal Communications Commission declaring that state regulatory commissions may not require telephone companies to use depreciation methods other than those prescribed by the FCC is an "order" under 47 U.S.C. 401(b), which provides for enforcement of "any order of the Commission, other than for the payment of money."

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INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION

Orders of the Federal Communications Commission are subject to enforcement in federal district courts pursuant to 47 U.S.C. 401(b). Petitioner seeks (1) to limit the "persons" against whom enforcement may be had to exclude state regulatory commissions and their members and (2) to limit the "orders" that may be enforced to exclude rulemaking orders. In the FCC's view, acceptance of either of petitioner's contentions would interfere with effective enforcement of its actions.

STATEMENT

The FCC regularly prescribes depreciation rates specifically for respondent, the Chesapeake and Potomac Telephone Company of Maryland (C&P). In 1983, the

FCC declared, in its "*Preemption Order*" (*In re Amendment of Part 31, Uniform System of Accounts*, 92 F.C.C. 2d 864; J.A. 17-49), that state regulatory commissions could not order telephone companies to use depreciation methods contrary to those prescribed by the FCC. At the same time, the FCC ruled, in a proceeding involving depreciation rates for C&P, that FCC depreciation orders are binding at both federal and state levels. *In re Prescription of Revised Percentages of Depreciation*, 92 F.C.C.2d 693, 700 (1982). Petitioner, the Public Service Commission of Maryland, nevertheless refused to permit C&P to follow the depreciation rates prescribed by the FCC in state ratemaking proceedings. C&P then filed an enforcement action in the United States District Court for the District of Maryland, pursuant to 47 U.S.C. 401(b), asking that Court to compel the Maryland commission to permit C&P to use the depreciation methods and rates prescribed by the FCC.[1] The district court issued a preliminary injunction requiring the Maryland commission to follow the FCC's orders (Pet. App. 11a-23a). The Fourth Circuit affirmed (Pet. App. 1a-10a).

1. Most telephone companies are subject to regulation by both state and federal authorities. State commissions regulate intrastate services, while the FCC over-

[1] Section 401(b) provides:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

sees interstate services. The commissions, both state and federal, base their rate regulation in part on the costs of facilities used to provide service within their respective jurisdictions.[2] Telephone companies are therefore subject to accounting rules and depreciation requirements that are essential to the performance of the regulatory agencies' ratemaking functions. Those rules, in turn, affect the telephone companies' ability to modernize their facilities.

The Communications Act of 1934 gives the FCC authority to establish a uniform system of accounts for common carriers and to prescribe rules to govern the depreciation of common carrier facilities. 47 U.S.C. 220; see *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232 (1936). Section 220(b) states that carriers "shall not" use any depreciation procedures other than those prescribed by the FCC. In 1980 and 1981, the FCC adopted two substantive orders changing its regulations that govern the depreciation of certain telephone company plant.[3] It concluded that the prior prac-

[2] The costs of facilities, most of which are used interchangeably for intrastate and interstate calls, are divided among the jurisdictions in accordance with procedures established by the FCC in cooperation with the state commissions. 47 U.S.C. 221(c), 410(c).

[3] In the first of the orders, the Commission accepted the use of "equal life group" and "remaining life" depreciation methods as a means of conforming the regulatory treatment of plant depreciation more closely to the actual decline in value and eventual retirement of that plant. *In re Amendment of Part 31, Property Depreciation*, 83 F.C.C.2d 267 (1980), reconsideration denied, 87 F.C.C.2d 916 (1981). In the second order, the FCC decided that it no longer would treat expenditures for "inside wiring" of residences and businesses as a capital investment subject to inclusion in the rate base and to depreciation. Instead, it would treat those costs as current expenses that the carrier would recover as part of its revenue requirement in the year in which they were incurred. *In re Amendment of Part 31, Uniform System of Accounts*, 85 F.C.C.2d 818 (1981).

tices had led to out-of-phase capital recovery and misallocation of costs, which conflicted with the FCC's policy of encouraging competition, and that they otherwise were inconsistent with the public interest.

At the request of state commissions and telephone companies, the FCC then considered whether its depreciation decisions preempted inconsistent depreciation practices in state ratemaking proceedings. After first deciding that state commissions were not preempted (*In re Amendment of Part 31, Uniform System of Accounts*, 89 F.C.C.2d 1094 (1982)), the FCC unanimously determined on reconsideration that state commissions must conform to the FCC's recent depreciation decisions if the purposes of those decisions were not to be frustrated (J.A. 17-49). The FCC also determined in its *Preemption Order* that Section 220(b) as a matter of law ousted the states from any role in setting depreciation rates for telephone equipment that is used in part for interstate services unless the FCC expressly has authorized such a role (J.A. 40). The FCC concluded that "inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void" (J.A. 39). The FCC gave general notice of its *Preemption Order* to carriers and to the public by publication in the Federal Register (J.A. 41). It gave particular notice to each of the state commissions by serving copies of the order on them (*ibid.*).

The FCC prescribed new depreciation rates specifically for C&P in December 1982 after a proceeding in which the Maryland commission was an active participant. *In re Prescription of Revised Percentages of Depreciation*, 92 F.C.C.2d at 697, 698-699. The Commission made this prescription only after (1) reviewing the carrier's filings; (2) making its own independent analysis and recommendations; and (3) receiving and considering comment from representatives of C&P and the Maryland commission. *Id.* at 696. In its order, which was adopted the same day as the *Preemption Order*, the FCC reiterated its ruling that federal depreciation orders "are binding at both the federal and state levels" (*id.* at 700).

2. A decision of the FCC, such as the *Preemption Order* or an order prescribing depreciation rates for C&P, is subject to agency reconsideration and to judicial review, at the instance of any person aggrieved by the decision, in the federal courts of appeals. 47 U.S.C. 405, 402(a); 28 U.S.C. 2342(1). The court of appeals for the circuit in which petition for review is filed has "exclusive jurisdiction to make and enter * * * a judgment determining the validity of * * * the order of the agency." 28 U.S.C. 2349(a). The court of appeals may stay or enjoin the operation of the FCC's order pending judicial review, on a proper showing. 28 U.S.C. 2349(b); Fed. R. App. P. 18. Under the Communications Act, FCC orders remain in force until the FCC or "a court of competent jurisdiction" issues a superseding order. 47 U.S.C. 408.

The Maryland commission did not seek review of the FCC order prescribing depreciation rates for C&P. The Virginia State Corporation Commission filed a petition for review of the *Preemption Order* in the Fourth Circuit. The Maryland commission did not intervene or participate in that review proceeding, although more than twenty other state commissions did. No party sought a stay of the FCC's order in that court. The Fourth Circuit affirmed the *Preemption Order* in June 1984. *Virginia State Corporation Commission* v. *FCC*, 737 F.2d 388. This Court has agreed to review the Fourth Circuit's affirmance of the *Preemption Order* and will hear oral argument in that case in tandem with this case. See *Louisiana Public Service Commission* v. *FCC*, No. 84-871.

3. This case arose in February 1983 when the Maryland commission refused to permit C&P to use the depreciation rates prescribed by the FCC in calculating

intrastate rates. C&P had argued on the basis of the *Preemption Order* that it was required to use the depreciation rates set by the FCC. The Maryland commission concluded that the FCC lacked authority to preempt and it refused to permit C&P to calculate its rates in accordance with the FCC's depreciation prescription (J.A. 62-70).

C&P filed a complaint in the United States District Court for the District of Maryland, pursuant to Section 401(b), seeking an injunction directing the Maryland commission to permit the company to use the rates prescribed by the FCC. As several other courts had done in similar cases,[4] the district court issued the injunction, requiring the Maryland commission "to abide by the FCC's [Preemption] Order regarding depreciation rates" (Pet. App. 12a).

The Fourth Circuit unanimously affirmed (Pet. App. 1a-10a), specifically rejecting the two arguments that

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[4] *E.g., Wisconsin Bell, Inc.* v. *Public Service Commission,* No. 84-C-4 (E.D. Wis. Nov. 13, 1984), appeal pending, No. 84-3110 (7th Cir.); *Northwestern Bell Telephone Co.* v. *Iowa State Commerce Commission,* No. 83-688-A (S.D. Iowa Sept. 27, 1984); *Mountain States Telephone & Telegraph Co.* v. *Department of Public Service Regulation,* 588 F. Supp. 5 (D. Mont. 1983); *New England Telephone & Telegraph Co.* v. *Public Utilities Commission,* 570 F. Supp. 1558 (D. Me. 1983), rev'd, 742 F.2d 1 (1st Cir. 1984), petition for cert. pending, No. 84-900; *South Central Bell Telephone Co.* v. *Louisiana Public Service Commission,* 570 F. Supp. 227 (M.D. La. 1983), aff'd, 744 F.2d 1107 (5th Cir. 1984), appeal pending, No. 84-870; *Southwestern Bell Telephone Co.* v. *State Corporation Commission,* No. 83-4090 (D. Kan. Apr. 8, 1983), appeal pending, No. 84-2295 (10th Cir.); *Pacific Northwest Bell Telephone Co.* v. *Washington Utilities & Transportation Commission,* 565 F. Supp. 17 (W.D. Wash. 1983), appeal pending, No. 83-3746 (9th Cir.). See also *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission,* 738 F.2d 901 (8th Cir.), rev'g, 584 F. Supp. 1087 (D. Ark. 1984), petition for cert. pending, No. 84-483. Contra *New England Telephone & Telegraph Co.* v. *Public Service Board,* 576 F. Supp. 4[illegible] (D. Vt. 1983), vacated as moot, No. 84-7051 (2d Cir. Dec. 5, 1984). Cf. *Illinois Bell Telephone Co.* v. *Illinois Commerce Commission,* 740 F.2d 566 (7th Cir. 1984).

the Maryland commission presses in this Court. The court of appeals first rejected the Maryland commission's argument that the defendants named by C&P are not persons within the meaning of Section 401(b). The court stated that the argument "is without merit because C&P's suit for preliminary injunction named not only [the Maryland commission] but also the officials comprising [the Maryland commission] as defendants. Thus, even if [the Maryland commission] is not a 'person' within the meaning of Section 401(b), [the Maryland commission]'s officials are expressly covered by that section" (Pet. App. 4a). The court also stated that "[the Maryland commission] must be considered a 'person' within the meaning of Section 401(b)" because a "contrary interpretation would undermine the Federal Communications Act by rendering [the Maryland commission] and other communications 'entities' immune from enforcement actions by the FCC under Section 401(b)" (*ibid.*).

The court also rejected the Maryland commission's argument that the *Preemption Order* is not an "order" within the meaning of Section 401(b). The court noted that the *Preemption Order* had been reviewed by the Fourth Circuit at the request of state commissions pursuant to 47 U.S.C. 402, which "only provides for review of FCC 'orders'" (Pet. App. 5a). If the *Preemption Order* is an order for purposes of review under Section 402, then, the court reasoned, it is necessarily an order for purposes of enforcement under Section 401.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress created the FCC for the purpose of centralizing, in one agency, the task of overseeing the communications industry in the United States and developing communications policies for wire and radio on an integrated basis. H.R. Rep. 1850, 73d Cong., 2d Sess. 3 (1934). It gave the Commission "a comprehensive mandate" (*Na-*

tional Broadcasting Co. v. *United States*, 319 U.S. 190, 219 (1943)), directing the agency to use its authority to make available a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U.S.C. 151.

Section 401 of the Communications Act is the principal section governing enforcement of the Act and of FCC orders entered in the exercise of authority granted by the Act.[5] Section 401(a) provides that the federal government may seek to enjoin violations of the Act itself "by any person" in the federal district courts. Section 401(b) provides that the federal government "or any party injured thereby" may seek enforcement of FCC orders in the federal district courts "if any person fails or neglects to obey any order of the Commission other than for the payment of money." Thus, Section 401(b) applies broadly to *any* person and to *any* order other than for the payment of money.

Petitioner argues that the enforcement provisions of the Act do not apply to it because neither it nor its individual members are "persons" under Section 401. The Act, however, expressly defines "person" to include "individuals" (47 U.S.C. 153(i)), so the individual members of the Maryland commission are clearly "persons." Moreover, while Section 153(i) does not mention state commissions in its list of what the term "person" includes, it does not exclude them either. State commissions are considered "persons" under other sections of

[5] Separate judicial enforcement mechanisms exist (1) for the resolution of certain complaints for damages against common carriers (as an alternative to agency resolution of those complaints), 47 U.S.C. 207; (2) for the consideration of mandamus petitions to compel common carriers to provide service on nondiscriminatory terms, where violation of the Act is alleged, 47 U.S.C. 406; (3) for the enforcement of FCC orders requiring the payment of money, 47 U.S.C. 407, 504(a); and (4) for the enforcement of FCC subpoenas, 47 U.S.C. 409(g). In addition, criminal penalties are available for some violations of the Act or FCC regulations. 47 U.S.C. 501, 502.

the Act. It is sensible to consider them persons under Section 401 as well since, otherwise, state commissions may frustrate national communications policy.

Petitioner also argues that, because the *Preemption Order* is the product of a rulemaking proceeding, it is not an "order" under Section 401(b). Petitioner argues that only adjudicatory orders can be enforced under Section 401(b). Petitioner concedes that orders resulting from rulemaking proceedings are "orders" under Section 402, which governs judicial review. The natural and sensible reading of the statute, we submit, requires the word "order" to be given the same meaning in Section 401(b) as in its neighboring provision. Private enforcement of rulemaking orders helps to effectuate the purposes of the Act, without interfering with the FCC's role in formulating national communications policy. The FCC performs its responsibilities under the Act through a combination of general, self-executing orders, such as the *Preemption Order*, and more detailed orders, such as the order prescribing depreciation rates to be followed by C&P. The FCC is thereby enabled to implement the statutory policies with greater efficiency. It is, accordingly, essential to the statutory scheme for the Act's enforcement provisions to apply to both categories of orders.

I. STATE UTILITY COMMISSIONS AND THEIR INDIVIDUAL MEMBERS ARE "PERSONS" SUBJECT TO ENFORCEMENT PROCEEDINGS UNDER SECTION 401(b) OF THE COMMUNICATIONS ACT

In plain terms, Section 401 provides jurisdiction in the federal district courts sufficient generally to prevent "any person" from thwarting the goals of the Communications Act either by direct violation of its terms or by disobeying an FCC order. "Person" is defined elsewhere in the Act to "include[] an individual, partnership, association, joint-stock company, trust, or corporation." 47

U.S.C. 153(i). Petitioner argues that neither the individual commissioners nor the state commissions are "persons" under Section 401(b).[6]

A. The Definition Of "Person" Clearly Includes Individual Commissioners And Does Not Exclude State Commissions

1. As the court of appeals concluded, the individual commissioners named as defendants in this case are "persons" under Section 401(b) of the Act. "Individuals" are specifically listed among the persons enumerated in Section 153(i). Therefore, if we assume that " 'the legislative purpose is expressed by the ordinary meaning of the words used' " (*Kosak* v. *United States*, No. 82-618 (Mar. 21, 1984), slip op. 5, quoting *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982), and *Richards* v. *United States*, 369 U.S. 1, 9 (1962)), the individual members of the Maryland commission are "persons." Individual state officials acting in their official capacities have traditionally been subject to injunctive actions to enforce federal rights, even where actions against the states themselves would be unavailable. See, *e.g.*, *Kentucky* v. *Graham*, No. 84-849 (June 28, 1985), slip op. 9-10 & n.18; *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974); *Ex parte Young*, 209 U.S. 123 (1908). The plain meaning of Sections 153(i) and 401(b) accordingly refutes petitioner's contention that its members are not "persons," and petitioner can point to nothing in the Act's legislative history to show that Congress did not intend the words of the statute to have their ordinary meaning.

[6] This argument has been rejected by the Fourth Circuit (Pet. App. 4a), the Fifth Circuit (744 F.2d at 1115-1116), and four district courts (Maryland, Pet. App. 16a-17a; Montana, 588 F. Supp. at 7; Maine, 570 F. Supp. at 1567; and Louisiana, 570 F. Supp. at 236). The Vermont district court accepted the argument (576 F. Supp. at 493-496).

2. State commissions should also be considered persons under the Act.[7] The Act's definition of "person" does not exclude state commissions: the illustrative list of persons in Section 153(i) is inclusive rather than exclusive. See *Pfizer, Inc.* v. *India*, 434 U.S. 308, 312 n.9 (1978); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941). Nonetheless, petitioner argues (Br. 14) that the fact that neither Section 401(b) nor Section 153(i) specifically includes state commissions is evidence of a congressional intention to exclude them. Quite the opposite conclusion is warranted. When Congress wanted to make particular exceptions in the Communications Act, it did so explicitly. For example, it specifically withdrew orders for the payment of money from the scope of Section 401(b). Similarly, Congress explicitly exempted governmental entities from certain li-

[7] This case does not raise the kinds of Eleventh Amendment policy concerns that this Court addressed in *Atascadero State Hospital* v. *Scanlon*, No. 84-351 (June 28, 1985). There, the Court reiterated the principle that exceptions to the general immunity of states from damage suits by private parties in federal court, established by the Eleventh Amendment, will be found only where Congress has specifically stated its intention to authorize such suits. First, enforcement suits under Section 401(b) are not suits for damages—indeed, Section 401(b) specifically *excludes* suits for enforcement of orders requiring the payment of money—but for injunctive relief. Under *Ex parte Young*, *supra*, state officials are regularly sued for injunctive relief. See *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979) (Eleventh Amendment concerns are not implicated in cases seeking injunctive relief). Second, although the enforcement suit in this case was brought by a private party, Section 401(b) does not distinguish between private parties and the federal government in authorizing enforcement suits and conferring district court jurisdiction. The Eleventh Amendment does not bar suits by the federal government against a state. *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965). If the term "person" is not to mean two different things in Section 401(b), depending on who the plaintiff is, using Eleventh Amendment policy considerations to construe "person" to exclude state commissions would deprive the FCC of the only procedure it has under the Act for judicial enforcement of the great majority of its orders against state agencies.

censing provisions. See 47 U.S.C. 302a(c) ("[t]he provisions of this section shall not be applicable * * * to devices or home electronic equipment and systems for use by the Government of the United States or any agency thereof"). An inference that Congress intended to exclude state agencies from the Act's comprehensive equitable enforcement provisions cannot justifiably be based on the absence of specific mention of such agencies where the "naturally broad and inclusive" meaning of the word "person" suggests their inclusion. See *Pfizer, Inc.*, 434 U.S. at 312.

Petitioner's argument (Br. 11-12) that state commissions should be excluded from the definition of "person" in Section 153(i) because a separate subsection, 47 U.S.C. 153(t), defines "[s]tate commission," is unconvincing. As one district court concluded, this argument "overstates the rigor of the definitional structure of the Act" (*New England Telephone & Telegraph Co.*, 570 F. Supp. at 1567).[8] Section 153, 47 U.S.C. (& Supp. I) 153, provides that its definitions apply "unless the context otherwise requires." Moreover, Section 153(i) is one of only five terms in Section 153 whose definition states what the term "includes" rather than what it "means." "Clearly, where the context of the use of the word 'person' requires that a state commission be considered a person, the section contemplates that that term has sufficient scope to embrace a state commission" (570 F. Supp. at 1568).

Petitioner also argues (Br. 13-14) that state commissions are "substantially different" from the types of entities listed in Section 153(i) and thus implicitly are excluded from the concept of "persons" under the definition. This Court has held that state agencies may be "persons" in instances in which the statutory definition of that term does not explicitly include public entities, and, indeed, where the examples given are substantially different in many respects from state agencies. See, *e.g.*, *Ohio* v. *Helvering*, 292 U.S. 360, 370 (1934) (state liquor authority is a person under Internal Revenue Code, which defined that term to mean and include "a partnership, association, company or corporation, as well as a natural person"). Under *Georgia* v. *Evans*, 316 U.S. 159, 161 (1942), whether the term "person" includes entities such as state commissions depends on its "legislative environment," which includes the structure of the Act, its legislative history, and practice and judicial rulings under the Act.[9]

[8] In reversing that decision, the First Circuit did not directly address the "person" issue. *New England Telephone & Telegraph* v. *Public Utilities Commission, supra* (Pet. App. 24a). It did, however, assume that state commissions are persons under Section 401 in suggesting that telephone companies could enforce FCC adjudicatory orders against state commissions under Section 401(b) (Pet. App. 38a).

[9] The Maryland commission also points out (Br. 14-15) that 47 U.S.C. 208 authorizes "[a]ny person, any body politic, or municipal organization, or State commission" to complain to the FCC about any action by a common carrier in violation of the Act. The Maryland commission contends that this language in Section 208 shows that Congress did not consider a state commission to be a person under the Act. Section 208 is better understood as an instance in which Congress wanted to be absolutely clear that governmental entities who might want to act on behalf of their citizens could file complaints with the FCC against carriers. Without such specificity, carriers might have argued that those bodies lacked standing to file complaints because they would not likely be injured in their own right by carrier actions. Stated differently, the redundancy in Section 208 was necessary to resolve possible doubts about the standing of state commissions to file complaints with the FCC. It is noteworthy that 47 U.S.C. 221(a) directs the FCC to provide notification "to the State commission * * * and to such other persons as it may deem advisable" when telephone companies apply for permission to consolidate. This language suggests that Congress thought of state commissions as "persons." In the final analysis, neither Section 208 nor Section 221(a), which point in different directions, is dispositive of the proper construction of Section 401(b).

B. The Legislative Structure And Context Support The Conclusion That State Commissions And Their Members Are "Persons" Under Section 401(b)

It is clear, and long established as a matter of practice, that the term "person" in many sections of the Communications Act includes states and their agencies. For example, in Section 301, Congress directed the FCC to provide for the use of radio channels by "persons." 47 U.S.C. 301. Many states and state agencies have licenses, and they would not likely contend that they are not "persons" eligible to obtain radio licenses. Nor are the states likely to contend that they are not "persons" for the purposes of Section 405 of the Act, which permits "any party * * * or any other person" to seek reconsideration of an FCC order. In fact, the California state commission filed such a petition in response to the FCC's substantive depreciation orders that are the origin of this case. See *California PUC Petition for Reconsideration*, Docket No. 79-105 (filed Apr. 29, 1981).[10]

There are several reasons why state commissions should be considered "persons" under Section 401(b) as well. The legislative history shows that Congress modeled Section 401(b) on Section 16(12) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 16(12) (repealed 1978). S. Rep. 781, 73d Cong., 2d Sess. 9 (1934); H.R. Rep. 1850, 73d Cong., 2d Sess. 7 (1934). There was, however, one highly significant change. Section 16(12) provided for relief "[i]f any carrier fails or neglects to obey any order of the Commission other than for the payment of money." Congress copied this phrase verbatim, except that it substituted "person" for "carrier." The committee reports do not explain the reason for

[10] Moreover, state commissions may seek review of orders such as the *Preemption Order* in the courts of appeals. As we argue, pages 20-21, *infra*, it logically follows that they ought to be subject to enforcement as well.

this change. But, in a scheme where the FCC, state commissions, and private carriers are principal actors, and the FCC has primary responsibility, it is reasonable to assume that Congress contemplated that its use of the broad term "person" (in preference to the model statute's term "carrier") would reach the state commissions. Surely, if Congress had intended otherwise, some explanation would have been needed to show that the broad term "persons" did not include state commissions or their members. Yet nothing in the legislative history indicates that Congress meant to exclude state commissions.

Section 401 creates general jurisdiction in the federal courts to enforce the Communications Act and the FCC's orders.[11] If neither state commissions nor their individual members are persons under Section 401, then the FCC, as well as private parties, would lack explicit authority to enforce the Communications Act and FCC orders against state commissions in federal courts. The efficacy of this provision would be undermined if state commissions were not subject to enforcement of orders requiring their compliance since state commissions can undermine the goals of the Communications Act by refusing to comply with such orders. Indeed, in recent years, a number of state commissions have resisted the competitive policies adopted by the FCC. In all but one instance in which the FCC has found its policies preemptive of inconsistent state regulation, reviewing courts have upheld the FCC's actions. See, *e.g.*, *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976); *North Carolina Util-*

[11] FCC orders do not require enforcement action to become binding, but take effect by operation of law and are binding "until the Commission or a court of competent jurisdiction issues a superseding order." 47 U.S.C. 408. See also 47 U.S.C. 416(c); *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 420 (1942).

ities Commission v. *FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977); *Computer & Communications Industry Association* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).[12] The FCC and interested private parties must be able to enforce such orders under Section 401(b) if they are to be effective against reluctant state agencies.

The case for enforcing FCC orders against state commissions is particularly compelling when the order at issue deals with depreciation practices. The Communications Act requires the FCC to prescribe depreciation rates and practices only after notifying state commissions and receiving and considering the views and recommendations of those commissions. 47 U.S.C. 220(b) and (j). State commissions may seek clarification or reconsideration of depreciation orders and obtain judicial review if they believe themselves to be aggrieved. 47 U.S.C. 405, 402(a). The role of the state commissions in the process of prescribing depreciation rates is so significant and detailed as to foreclose any legitimate claim that Congress, after setting up the process, intended to immunize state commissions from enforcement of the resulting depreciation orders.

While it is reasonable to assume that most state agencies will comply voluntarily with lawful orders of the FCC, the experience of the FCC with its depreciation *Preemption Order* reveals that judicial enforcement is necessary in some cases. Even though the FCC's *Preemption Order* was under review in a court of appeals with authority to stay or enjoin its effectiveness, the

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[12] The single exception was the FCC's attempt to preempt state regulation of the use of local leased access channels on cable television systems. *National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601 (D.C. Cir. 1976). The court of appeals reversed the FCC's decision in that case because it exceeded the FCC's limited authority to regulate cable television in ways that are " 'reasonably ancillary' " to the regulation of broadcast television (*id.* at 621-623 (Lumbard, J., concurring)).

Maryland commission and several other state agencies deliberately refused to comply without seeking interim judicial relief pending review. This practice constituted an evasion of the jurisdiction of the court of appeals and a considered defiance of the FCC's order—conduct that Section 401(b) was clearly designed to remedy. See *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 738 F.2d at 906, 908-909.[13]

Nor would a holding that state commissions are "persons" within the meaning of Section 401(b) authorize federal courts to interfere improperly in intrastate ratemaking.[14] In virtually every one of the enforcement cases prompted by the *Preemption Order*, the action of the district court was confined simply to ordering the state commission to permit the telephone company to use the

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[13] It is no answer to assert (Br. 14 n.8) that enforcement against states is unnecessary under Section 401(b) because state courts will set aside state commission decisions that are contrary to federal law. The Communications Act's remedies are "in addition to" other remedies. 47 U.S.C. 414. Moreover, reliance on state court actions would seriously hinder the FCC in enforcement of its orders, since the FCC would have to confront varying state law requirements in order to obtain enforcement, rather than complying only with the clear and straightforward requirements of Section 401(b). Furthermore, reliance on enforcement in state courts would surely lead to the sort of inconsistent application decried by amici state commissions in arguing (Br. 8-10) that only the FCC should be permitted to enforce rulemaking orders. And, finally, there is no warrant for barring enforcement in federal courts "without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 n.8 (1979).

[14] The Maryland commission contends (Br. 20) that the Johnson Act, 28 U.S.C. 1342, evidences a federal policy against permitting federal courts to issue injunctions in state ratemaking proceedings. The Johnson Act does not foreclose federal court jurisdiction in this case, however, because jurisdiction is not based on diversity or on a claim that the state's rate order was unconstitutional, but on a federal statute expressly authorizing the district court to act. See *South Central Bell Telephone Co.*, 744 F.2d at 1123 n.28.

depreciation rates and methods prescribed by the FCC. In the one instance where the court was required to go further, its action was designed merely to protect the integrity of its original injunction.[15]

Finally, as we have shown (page 10, *supra*), there is no basis for doubt that the individual members of state commissions are "persons" within the meaning of Section 401(b). No reason is apparent to explain why, in that circumstance, Congress would not have intended equitable relief under that Section to be available also against the commissions themselves.

II. THE FCC'S *PREEMPTION ORDER* IS ENFORCEABLE UNDER SECTION 401(b)

Section 401(b) authorizes judicial enforcement of "any order of the Commission, other than for the payment of money." The statutory language does not except rulemaking orders; nor does it restrict enforcement to adjudicatory orders. Petitioner, adopting the reasoning of the First Circuit in *New England Telephone & Telegraph Co.* v. *Public Utilities Commission, supra* (Pet. App. 24a), argues nonetheless that Section 401(b) does not authorize district courts to enforce FCC rulemaking orders.[16]

A. The Plain Meaning And Legislative Context Of Section 401(b) Show That Rulemaking Orders Are Enforceable Under That Section

Section 401(b) applies to "any order of the Commission other than for the payment of money." It refers to *any* order, making no distinction between adjudicatory orders and rulemaking orders. If Congress had intended to restrict Section 401(b) to the enforcement of adjudicatory orders, it could have written the statute more narrowly. Indeed, the fact that Congress expressly excluded orders for the payment of money from the otherwise comprehensive language of the enforcement statute strongly suggests that Congress intended the statute to apply to all other classes of FCC orders.[17]

This Court has assumed that Section 401 is available for the enforcement of regulations implemented under the Communications Act as a result of agency rulemaking. In *Ambassador, Inc.* v. *United States*, 325 U.S. 317, 325 & n.7. (1945), the Court affirmed a district court decision enjoining hotels from violating tariff regulations imposed by a telephone company, where the telephone company was complying with an FCC rulemaking order in imposing the regulations. Although the Court did not address the issue, it implicitly assumed that rulemaking orders could be enforced under Section 401(b).[18] See also

[15] See *South Central Bell Telephone Co.* In that case, the district court issued a preliminary injunction ordering the Louisiana commission to permit South Central Bell to use the depreciation rates prescribed by the FCC. The Louisiana commission responded by reducing the telephone company's rate of return, without further proceedings, so as to minimize the effect of the preliminary injunction. The district court concluded that the Louisiana commission deliberately had not complied with its order. The court, stressing that the commission had received no evidence before adjusting the rate of return, modified its injunction by ordering the commission to permit South Central Bell to increase its revenues in order to recover the entire amount the commission had determined was required on account of application of the depreciation practices prescribed by the FCC. The Fifth Circuit affirmed. *South Central Bell Telephone Co.* v. *Louisiana Public Service Commission*, 744 F.2d at 1113-1114, 1121-1122. Compare *New England Telephone & Telegraph Co.* v. *Public Utilities Commission*, 579 F. Supp. 1356, 1361-1362 (D. Me. 1984) (reasonable adjustment of rate of return in light of new depreciation procedures is permissible).

[16] The reading of Section 401(b) urged by the petitioner has been rejected by the Fourth Circuit (Pet. App. 4a-5a), the Fifth Circuit (744 F.2d at 1115-1119), and the three district courts that have addressed the issue (Louisiana, 570 F. Supp. at 236; Maine, 570 F. Supp. at 1571-1577; and Washington, 565 F. Supp. at 21). The First Circuit reversed the Maine district court's decision.

[17] Moreover, Congress limited some provisions of the Act expressly to adjudication. See, *e.g.*, 47 U.S.C. 409.

[18] The *Ambassador* opinion cites Section 401 as the source of judicial authority to restrain a violation of the tariff regulation. 325 U.S. at 325 & n.7. The suit must have been grounded on

Brookhaven Cable TV, Inc. v. *Kelly*, 428 F. Supp. 1216 (N.D.N.Y. 1977), aff'd, 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979) (enforcing an FCC declaratory ruling that was entered in clarification of an order adopting rules for cable television).[19]

Both Section 401(b) and Section 402, the provision governing judicial review of FCC orders, use the phrase "any order of the Commission" to describe their applicability. It is well established, and the petitioner apparently concedes (Br. 29-30), that this phrase as used in Section 402 includes rulemaking "orders." See *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 417 (1942).[20] Thus, petitioner's argument runs counter to the

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subsection 401(b), because violation by a telephone company's customer of a prescribed tariff regulation is not necessarily a violation of any provision of the Act itself, and subsection 401(a) is available only to enforce provisions of the Act. See *South Central Bell Telephone Co.*, 744 F.2d at 1117 n.18.

[19] Petitioner errs in relying on *Comtronics, Inc.* v. *Puerto Rico Telephone Co.*, 409 F. Supp. 800 (D.P.R. 1975), aff'd on other grounds, 553 F.2d 701 (1st Cir. 1977), and *Kroeger* v. *Stahl*, 148 F. Supp. 403 (D.N.J.), aff'd, 248 F.2d 121 (3d Cir. 1957), in arguing that "courts have historically declined to enforce FCC rules and regulations on behalf of private litigants" (Br. 32-33). No specific rulemaking order of the FCC appeared to be at issue in *Comtronics*. Rather, the plaintiff vaguely alleged that the defendant had violated FCC "holdings, rulings and policies" (409 F. Supp. at 804) by failing to connect its telephone lines to equipment sold by plaintiff. The court said nothing remotely suggesting that a rulemaking order is not enforceable under Section 401(b). In *Kroeger*, the plaintiff obtained a license from the FCC to conduct radio tests and then argued that the license was an FCC order that implicitly barred local authorities from denying his application for a variance to build a 75-foot radio mast on residential property. The court rejected that frivolous claim. By contrast, the *Preemption Order* here at issue specifically held that state commissioners were bound to comply with the FCC's depreciation rules.

[20] FCC rulemaking orders prescribing accounting methods and depreciation rates and practices have long been deemed reviewable. See, *e.g.*, *American Telephone & Telegraph Co.* v. *United States*, 299

"natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). See, *e.g.*, *Bob Jones University* v. *United States*, 461 U.S. 574, 586-588 (1983).

There are no differences between Sections 402 and 401(b) that justify different treatment of these identical phrases. A principal reason for this Court's finding in *Columbia Broadcasting System, Inc.* that rulemaking orders are reviewable was that such orders are self-executing and require immediate compliance. 316 U.S. at 417-423. The same reasoning supports the conclusion that rulemaking orders should be enforceable. As the Fifth Circuit pointed out, "[s]ubstantial unfairness can result from either compliance with an improper regulation or noncompliance with a proper one." 744 F.2d at 1118. Indeed, acceptance of petitioner's argument would create the anomalous situation in which a state commission (or any other party) could seek review of an FCC order adopting rules, lose its case on the merits, and still avoid enforcement pursuant to Section 401(b) until and unless the FCC went through further administrative procedures to generate a specific adjudicatory order that could be enforced.[21]

U.S. 232 (1936). Similarly, FCC orders declaring the preemptive effect of the Commission's substantive rules and policies have been reviewed without suggestion that the court of appeals lacked jurisdiction. See, *e.g.*, *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787 (4th Cir. 1976).

[21] Moreover, this case cannot accurately be regarded as one seeking enforcement of an abstract rule. Although the *Preemption Order* was adopted in a rulemaking docket, that order disposed of particular requests for declaratory relief as to the meaning and applicability of the FCC's substantive rules, both in general and in the particular context of a dispute between the Ohio commission and a telephone company. The Administrative Procedure Act (APA) authorizes the FCC to issue declaratory rulings to terminate controversy or remove uncertainty, and provides that such orders

Petitioner's argument is also contrary to the FCC's consistent interpretation of Section 408 of the Act, which provides that "all orders of the Commission, other than orders for the payment of money," become effective thirty days after the date "public notice of the order is given." The FCC has regarded this statute as governing the effectiveness of rulemaking orders. See 47 C.F.R. 1.427. Petitioner would have this Court conclude that although FCC rulemaking orders are effective under Section 408 and reviewable under Section 402(a), they are nonetheless unenforceable under Section 401(b), even though these provisions use identical language. The anomaly of this contention is apparent: an unenforceable order is ineffective against anyone who chooses to disregard it.[22]

have "like effect as in the case of other orders." 5 U.S.C. 554(e). In addition, the FCC in a 1982 depreciation proceeding involving several individual carriers, specifically prescribed depreciation rates and practices for C&P in Maryland and specifically declared the preemptive effect of those prescriptions. *In re Prescription of Revised Percentages of Depreciation*, 92 F.C.C.2d at 700. Whatever merit a narrow interpretation of "order" might have in the (perhaps unrealistic) context of an attempt to enforce an abstract rule, it would elevate form over the substance of the FCC's actions here to hold those actions unenforceable. The particular method by which the FCC has adopted its order—rulemaking or adjudication—is not conclusive; "it is the substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. at 416.

[22] The cases petitioner cites (Br. 33-34) that were decided under Section 16(12) of the Interstate Commerce Act do not support its argument that rulemaking orders are not "orders" under Section 401(b). In *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965), cert. denied, 382 U.S. 1026 (1966), the plaintiff contended that the defendant had violated a management contract that had been authorized by the ICC. In *Farmers' Loan & Trust Co.* v. *Northern Pac. Ry.*, 83 F. 249 (D. Wash. 1897), the order at issue was directed at two specific railroads. Neither case involved any rulemaking order or other order comparable to the *Preemption Order*. This Court's statement in *Illinois Cent. R.R.* v. *Public Utilities Commission*, 245 U.S. 493, 502 (1918), that "[i]n common acceptation a suit to enforce an order of the [ICC] is one which seeks to compel the carrier to whom the order is directed to yield obedience to its command" is also irrelevant. As we have noted (page 14, *supra*), Section 16(12) applied to disobedience by "carriers" rather than by "persons." The Court made the statement petitioner quotes, not in order to address any question relevant to a distinction between rulemaking and adjudicatory orders, but because, in *Illinois Cent. R.R.*, the suit was brought "by the carriers, not against them" (245 U.S. at 503).

Moreover, as the Fifth Circuit noted in *South Central Bell* (744 F.2d at 1118 n.20), the cases construing Section 16(12) support its conclusion that Congress did not intend to exclude rulemaking orders from enforcement under Section 401(b). In *Pacific Fruit Express Co.* v. *Akron, C. & Y. R.R.*, 524 F.2d 1025 (9th Cir. 1975), cert. denied, 424 U.S. 911 (1976), an order directed generally at all rail carriers using protective services was at issue. The court concluded that "the District Court, pursuant to the broad power to compel obedience under § 16(12) * * *, had the power to mandate compliance with that order" (524 F.2d at 1031). Similarly, *United States* v. *City of Jackson*, 318 F.2d 1 (5th Cir. 1963), involved a general order forbidding carriers to use segregated facilities. The court found that order enforceable under Section 16(12) (318 F.2d at 9).

Finally, there is no merit to petitioner's attempt to use the Administrative Procedure Act's definition of the word "order" to interpret Section 401(b). Neither the Communications Act nor the APA suggests that the APA definitions are relevant in interpreting the Communications Act.[23] There is no reason to engraft the APA's definition of "order" onto Section 401(b) in the absence of statutory language requiring it or at least some reference in the legislative history indicating that this was Congress's intention. This is especially so since the distinction between rulemaking and adjudication in the APA's definition of "order" is designed to indicate what agency procedures apply to a given administrative undertaking, not whether agency actions are enforceable.[24] Petitioner

[23] The APA's definition section states that its definitions are "[f]or the purpose of this subchapter." 5 U.S.C. 551. The Communications Act has its own definition provisions, although they do not define "order." 47 U.S.C. (& Supp. I) 153.

[24] It is noteworthy that where the APA deals with matters other than agency procedures, such as the provisions for judicial review,

has shown no basis for applying a distinction regarding procedural matters in one statute to the enforcement provisions of another statute.

B. Effective Implementation Of The Act Is Enhanced By Enforceability Of Rulemaking Orders Under Section 401(b)

Petitioner primarily relies on policy arguments [25] in contending (Br. 34) that only the FCC, and not private parties, should be permitted to enforce rulemaking orders.[26] However, policy considerations under the statute actually support the opposite conclusion.

It is true that the FCC is primarily responsible for enforcement of the Act and for developing a coherent

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it does not use the term "order." In defining those actions that are reviewable in court, the APA uses the term "agency action" and does not distinguish between adjudicatory and rulemaking actions. 5 U.S.C. 701-705.

[25] Of course, this Court has no policy-making role that would permit it to ignore the plain language of the statute. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

[26] If rulemaking orders are not enforceable under Section 401(b), then it is not clear that they are judicially enforceable at all. No other provision of the Act explicitly applies to the enforcement of FCC orders, other than the narrow provisions for enforcement of orders for the payment of money and subpoenas. 47 U.S.C. 407, 504(a), 409(g). The Maryland Commission and amici assume that rulemaking orders are enforceable under Section 401(a), which applies to "violation of any of the provisions of this chapter by any person," because "rulemaking orders are the functional equivalent of the provisions of the Act itself" (Amici Br. 6; see Br. 32 ("enforcement of FCC 'rules and regulations' in effect constitutes enforcement of the Act itself")). But it is not at all clear that all violations of rulemaking orders are also violations "of the provisions of this chapter"—indeed it is much more natural to describe such a violation as a violation of an "order of the Commission other than for the payment of money" as specified in Section 401(b). If rulemaking orders are not enforceable at all, then there is a large gap in the enforcement provisions of the Act, which petitioner does not defend as a policy matter.

communications policy.[27] However, permitting the courts to enforce FCC rulemaking orders in actions brought by private parties pursuant to the specific procedures in Section 401(b) does not conflict with the FCC's responsibilities. Rather, the very justification for private enforcement statutes such as Section 401(b) is that the agency may not have the resources to police every violation of its orders and that private parties aggrieved by such violations can help to do so. Cf. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 477 (1940) (one with a financial stake in a matter before the agency may be the only one with sufficient interest to prosecute it to completion).

The narrow function of the district court in Section 401(b) enforcement actions ensures that the court need not encroach on the agency's responsibilities. Under Section 401(b), the only questions for the enforcing court are whether the FCC's order was properly entered and duly served or published, whether the defendant has violated it, and whether the complainant has been injured by the violation. These questions normally will be readily answered without substantial judicial inquiry into regulatory matters. If questions regarding communications policy arise, the enforcing court can and should either refer such questions to the FCC under the doctrine of primary

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[27] The Maryland commission's assertion that "only the FCC can enforce the Act" (Br. 32) overlooks several statutes authorizing private actions to vindicate rights under the Act and regulations adopted in implementation of the Act. For example, Section 207 authorizes complaints either to the FCC or to a district court alleging damages as a result of violations by carriers and empowers the court to award damages and attorneys' fees. Section 406 authorizes private suits in district courts to obtain service on a nondiscriminatory basis from carriers subject to the Act. Thus, while it is true that the FCC has principal responsibility for enforcing the Act, it is incorrect to base a narrow interpretation of Section 401(b) on the premise that *only* the FCC can enforce the Act and its regulations.

jurisdiction or solicit the FCC's views as an intervenor or as amicus curiae.[28] In this way, the FCC's role as primary interpreter of the Communications Act is preserved, and the district court may fulfill the particular responsibilities Congress conferred on it in Section 401(b).

Agencies such as the FCC have broad discretion to use either rulemaking or case-by-case adjudication (or some combination of the two) to carry out their statutory responsibilities. See *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). That discretion would be unduly restricted, to the detriment of efficient administration of the Act, if the Commission could not adopt self-executing rules to implement the statute and rely in part on private enforcement actions for their effectuation.

Under the First Circuit's view of Section 401(b) (Pet. App. 39a), the FCC could conduct separate adjudicatory proceedings as each state refused to permit its local telephone companies to use the depreciation rates and methods prescribed by the FCC, issue specific orders to each state commission, and thereafter obtain enforcement in the courts. There is no reason to require such redundant procedures, as this case demonstrates. The FCC has issued detailed and particularized orders requiring certain depreciation rates for C&P, and it has declared the preemptive effect of its depreciation orders. The Maryland commission did not seek judicial review of the pertinent orders, but simply went its own way in disregard

[28] In most of the enforcement cases that have arisen under the *Preemption Order*, the FCC has been invited to participate as amicus curiae and has done so. *E.g.*, *South Central Bell Telephone Co.*, 744 F.2d at 1118. Under some circumstances, a failure by the district court to obtain the views of the FCC may be reversible error. See *MCI Communications Corp.* v. *AT & T*, 496 F.2d 214 (3d Cir. 1974) (district court injunction under Section 406 vacated because the matter should have been referred to FCC under doctrine of primary jurisdiction to develop important policy views).

of them. A further order or action by the FCC to vest the district court with enforcement authority could be no more specific than the orders already issued and would only produce delay.

Finally, there is no merit to the First Circuit's somewhat inconsistent concern (Pet. App. 34a-35a) that permitting private enforcement of FCC rulemaking orders such as the ones involved here will produce piecemeal review of state ratemaking proceedings.[29] Enforcement actions under Section 401(b), whether brought by private persons or by the FCC itself, do not require or authorize the federal district courts to engage in "review" of state rate proceedings. Under the statute, the role of the district courts is confined to enforcement of an FCC order.

[29] The fact that a telephone company such as C&P might challenge a state commission's ratemaking order in state courts does not detract from its right to seek relief in the federal district court insofar as the state ratemaking order involves violation of an FCC order. The Communications Act does not abridge or alter remedies already existing at common law or by statute, but its provisions "are in addition to such remedies." 47 U.S.C. 414.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 84-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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October 1985

QUESTIONS PRESENTED

Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), provides that any injured party may bring an enforcement action in federal district court against "any person" who violates "any order" of the Federal Communications Commission (other than one for the payment of money). The questions presented are:

1. Whether Section 401(b) embraces orders issued by the FCC in the course of rulemaking proceedings as well as FCC orders issued in adjudicatory proceedings.

2. Whether the Maryland Commission and its individual members are "persons" subject to an enforcement action under Section 401(b).

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BRIEF OF AMICI SUPPORTING RESPONDENT

INTEREST OF AMICI

This brief is filed on behalf of American Telephone and Telegraph Company and the Bell Operating Companies of four independent regional systems: Ameritech, BellSouth, NYNEX, and Southwestern Bell.[1] The interest of amici is that they, like respondent C&P Telephone Company of Maryland, are subject to the FCC's depreciation decisions and have a direct interest in prompt and effective enforcement of those decisions under Section 401(b) the Communications Act, 47 U.S.C. § 401(b). Several of the amici are plaintiffs in Section 401(b) cases to

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[1] The names of the amici companies are set forth in Appendix A (p. 1a, below), together with the listing required by S. Ct. R. 28.1 (p. 2a, below).

enforce depreciation decisions, including three cases now awaiting review in this Court.[2] Amici have filed with the Clerk of this Court written consents from both the petitioner and the respondent. S. Ct. R. 36.2.

STATEMENT OF FACTS

A. The Depreciation and Preemption Orders

Depreciation has always been a vital subject in the regulation of telecommunications.[3] As is true of most carriers and utilities, the telephone industry is capital intensive, and depreciation is therefore one of the largest expenses incurred in providing service. Without adequate provision for depreciation, the industry could not renew and modernize its plant.

In the Communications Act of 1934, 47 U.S.C. § 151, *et seq.* ("the Act"), Congress singled out depreciation for special attention. Section 220, 47 U.S.C. § 220, gives the FCC power to set depreciation for carriers subject to the Act and it forbids carriers from deviating from FCC determinations.[4] The FCC must consider the "views and recommendations" of the states (Section 220(i), 47 U.S.C. § 220(i)), but Congress rejected a proposed amendment [5] that would have allowed the states to set different depreciation rates in state proceedings. For decades, the FCC has maintained rules governing depreciation and, since the 1940s, has prescribed individual depreciation rates for larger carriers.

The present case has its origins in decisions made by the FCC in 1980 and 1981 ("the Depreciation Orders") affecting

[2] See Appendix B (p. 1b, below) for a complete listing of cases.

[3] Depreciation measures the loss of service value of a capital asset over time, and the carrier's annual depreciation expense is recovered through rates, together with other expenses of operation.

[4] See Sections 220(b) and (g), 47 U.S.C. §§ 220(b), (g).

[5] The pertinent legislative history is discussed in detail in the joint brief to be filed by the amici and others as respondents in No. 84-871, *et al.* (hereafter "Joint Brief").

depreciation in several important respects.[6] In these decisions, the FCC authorized carriers to employ the Straight-Line Equal Life Group ("SLELG") method for grouping items subject to depreciation; it approved the "remaining life" convention for correcting depreciation when estimates of useful life must be revised after an item of plant has been partly depreciated, and it ordered that certain expenditures for "inside wiring" be expensed rather than depreciated.[7] Many state commissions, including the Maryland Commission, participated in one or more phases of the FCC proceeding that led to the Depreciation Orders. *E.g.*, 83 F.C.C.2d at 269 n.1.

After the FCC adopted its Depreciation Orders, NARUC [8] and California sought reconsideration, urging the FCC to hold that the state commissions need not respect these new depreciation rules in intrastate rate proceedings. Ruling on this request in 1982, the FCC reaffirmed that it could require the states to respect federal depreciation rules; however, by a 4-to-3 vote, the FCC found no present need to exercise that authority.[9] AT&T and GTE then sought reconsideration. They showed that states were already beginning to reject SLELG and remaining life, and they urged the FCC to require the states to respect the Depreciation Orders.[10]

[6] *In re Amendment of Part 31*, 83 F.C.C.2d 267 (1980), *recon. denied*, 87 F.C.C.2d 916 (1981); *In re Amendment of Part 31*, 85 F.C.C.2d 818 (1981).

[7] The changes, discussed in the Depreciation Orders (p. 3, n.6, above), are described in greater detail in the Joint Brief.

[8] NARUC is the National Association of Regulatory Utility Commissioners.

[9] See *In re Amendment of Part 31*, 89 F.C.C.2d 1094 (1982). As the FCC later explained, it believed that the states would continue to follow FCC depreciation determinations as they had done in the past, without need for a mandatory order. See *In re Amendment of Part 31*, 92 F.C.C.2d 864, 866-67 (1983).

[10] AT&T filed a petition for reconsideration in the on-going rulemaking proceeding. GTE filed a separate request with the FCC for a declaratory order, addressing the refusal of the Ohio Commission to permit the use of SLELG and remaining life. Such a declaratory order proceeding is technically classified as an adjudication under the APA classification. See p. 14, n.38, below. The FCC consolidated the two requests and disposed of them in the same decision.

By order released in January 1983 ("Preemption Order"), the FCC unanimously ordered that its depreciation decisions be respected by the states.[11] The FCC pointed out that the same telephone plant is used interchangeably for interstate and intrastate communication. 92 F.C.C.2d at 877. It explained that its new depreciation rules were needed to make more accurate depreciation determinations, encourage modernization of telephone plant, and achieve better service for the public. *Id.* at 876-77. Because the same plant of the same carriers is involved in both FCC and state ratemaking proceedings, the FCC found that the states' use of inconsistent depreciation methods would frustrate essential national policy for telecommunications. *Id.*

A number of state commissions sought review of the Preemption Order in the Fourth Circuit pursuant to statutory direct review provisions.[12] None of the states sought a stay of the Preemption Order from the Fourth Circuit, and it therefore became effective in early 1983. The FCC also began, in its regular prescriptions of depreciation for larger telephone companies, to employ SLELG and remaining life in determining depreciation rates for those companies. In June 1984, the Fourth Circuit affirmed the Preemption Order.[13]

B. Section 401(b) Enforcement Proceedings

Although many states respected the FCC's directive that SLELG and remaining life be permitted, other state commissions refused to do so. The reason for their resistance is that SLELG and remaining life, as compared to the methods they replaced, often increase the amount of depreciation recognized

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[11] *In re Amendment of Part 31, supra,* 92 F.C.C.2d at 879-80. That order is under review in this Court in No. 84-871, *et al.*

[12] Section 402(a) of the Act, 47 U.S.C. § 402(a), provides that proceedings to review "any order" of the Commission (except for a narrow class of broadcast license-related orders) should be brought pursuant to the Hobbs Act, 28 U.S.C. § 2341, *et seq.* The Hobbs Act gives the court of appeals "exclusive" jurisdiction over proceedings to review FCC orders. 28 U.S.C. § 2342.

[13] *Virginia State Corporation Comm'n* v. *FCC,* 737 F.2d 388 (1984), *appeal and cert. pending,* No. 84-871, *et al.*

in earlier years and decrease the amount recognized in later years.[14] It is a fact of political life that state commissions are often under extreme local pressure to resist temporary increases in utility or carrier rates even if the effect of the increases would be to produce lower rates and better service over the long term.

Accordingly, a number of state commissions flatly refused to accept the FCC's depreciation decisions. The Maryland Commission, for example, rejected the use of SLELG and remaining life by C&P Telephone Company of Maryland ("C&P"), holding that the "depreciation practices established by the FCC in no way limit this Commission's authority . . . ."[15] Similarly, the Maine Commission objected to the use of remaining life by New England Telephone and Telegraph Company, holding that "the FCC erred" in its Preemption Order.[16] Such state-commission action imposes substantial and irreparable injury on the carriers; in the present case, for example, C&P showed that such injury amounted to $16.1 million in lost revenues in the first year.

Section 401(b) of the Act, 47 U.S.C. § 401(b), provides, with a single exception, for federal district court enforcement of "any order" of the FCC.[17] Section 401(b) states that if "any person" fails to obey "any order" of the FCC (other than for payment of money), the Attorney General, the FCC, or "any party injured thereby" may seek enforcement in district court. If the district court determines that the order was "regularly made and duly served" but is being disobeyed, then the statute directs that the district court "shall enforce obedience" by an appropriate injunction. *Id.*

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[14] SLELG and remaining life are methods used to obtain more accurate measurement of straight line depreciation. They replace older methods that often deferred recovery of depreciation.

[15] *In re Application of C&P of Maryland,* No. 7661, Feb. 18, 1983, p. 18.

[16] *New England Telephone and Telegraph Co.,* No. 82-124, Apr. 26, 1983, p. 36.

[17] Orders for the payment of money are enforced through a different set of procedures under Section 407, 47 U.S.C. § 407.

In this case, C&P brought suit under Section 401(b) in Maryland District Court, naming both the Maryland Commission and the individual commissioners as defendants. Complaint (J.A. 8).[18] C&P sought an injunction directing the defendants to permit C&P's use of SLELG and remaining life. Following a number of other district courts that have granted such injunctions under Section 401(b), the Maryland District Court granted the injunction. 560 F. Supp. 844 (Pet. App. 11a). On review, the United States Court of Appeals for the Fourth Circuit unanimously affirmed. 748 F.2d 879 (Pet. App. 1a).

The Fourth Circuit rejected two legal objections made by the Maryland Commission which the agency renews in this Court. First, the Maryland Commission argued that Section 401(b) is limited to enforcing orders issued in adjudicatory proceedings and does not embrace orders issued in rulemaking proceedings. Like most other courts construing Section 401(b) (see p. 10, below), the Fourth Circuit held that the Preemption Order did constitute an "order" within the meaning of Section 401(b).[19]

Second, Maryland argued that a state commission cannot be regarded as a "person" under Section 401(b). That view was accepted by one district court but rejected by at least six other courts in Section 401(b) cases. See p. 17, below. The Fourth Circuit held that the injunction would be effective against the individual commissioners as persons even if the state commission itself were dismissed as a party. 748 F.2d at 881 (Pet. App. at 4a). It also held that a state commission is a person under Section 401(b). *Id.*

This case is only one of a number in which injunctions to enforce the FCC's Depreciation and Preemption Orders were

[18] References to "J.A." are to the Joint Appendix in this case. References to "Pet. App." are to the Appendix to the Maryland Commission's Petition for Certiorari.

[19] The only court known to have accepted the distinction urged by the Maryland Commission is the First Circuit. *New England Telephone and Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984), *petition for cert. filed*, No. 84-900.

sought under Section 401(b). Such injunctions were granted by almost all of the district courts.[20] Rulings directing or sustaining such injunctions were issued by the Fourth Circuit, the Fifth Circuit, and the Eighth Circuit; only the First Circuit refused to do so. See pp. 1b-2b, below. In parallel litigation under Section 401(b), the Seventh Circuit upheld a preliminary injunction under Section 401(b) to enforce another FCC order against a state commission and its members.[21]

The FCC itself participated as an amicus in a number of the Section 401(b) cases, generally supporting the injunctions. It explained that its own limited resources prevented the FCC from seeking injunctions in every case of disobedience (see pp. 12-13, below), and it endorsed the use of private actions under Section 401(b). Similarly, filing as an amicus in companion cases in this Court, the Solicitor General has taken the position that private parties should be permitted to enforce the kind of orders involved in this case.[22]

SUMMARY OF ARGUMENT

1. Section 401(b) of the Communications Act authorizes any party to bring an enforcement action in federal district court against "any person" that disobeys "any order" of the FCC, except for the payment of money. The language of the statute does not distinguish between orders issued in rulemaking proceedings and orders issued in adjudications, and neither the statute nor its legislative history suggests that Congress intended to create an exception to the remedy in Section 401(b) by excluding FCC rulemaking orders.

[20] Such injunctions were granted by District Courts in Kansas, Iowa, Louisiana, Maine, Maryland, Montana, Wisconsin and Washington. The Vermont District Court refused to issue such an injunction and the case became moot while on appeal to the Second Circuit. The Arkansas District Court initially refused to do so but was reversed by the Eighth Circuit. See p. 1b, below.

[21] *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 740 F.2d 566 (7th Cir. 1984).

[22] Brief for United States as *amicus curiae* in No. 84-483, *et al.*, p. 12.

The Maryland Commission's proposed construction of the term "order" has been rejected by the agency responsible for the administration of the Act as well as by the Fourth Circuit, the Fifth Circuit and a number of District Courts. It also conflicts with this Court's decision in *CBS* v. *United States,* 316 U.S. 407 (1942), in which this Court held that the word "order," in an adjacent section of the Act governing judicial review, *does* embrace orders issued in rulemakings. Furthermore, construing Section 401(b) in accordance with its plain meaning will advance the remedial purposes of the statute, and prevent gaps in the statute's regime for court enforcement.

2. Section 401(b) permits enforcement actions to be brought in federal court against state commissions and their individual members when they disobey an order of the FCC. Individually named state commissioners are clearly "persons" who are subject to enforcement actions under Section 401(b). This reading not only accords with the language of the Act but implements the settled principle that federal courts may order prospective non-monetary relief against individual state officers who violate federal law. *Ex parte Young,* 209 U.S. 123 (1908).

State commissions also are "persons" subject to enforcement actions under Section 401(b), although the effective outcome would not be changed if the injunction ran only against the commissioners. The plain intent of the statute is that enforcement actions shall be available against any natural or legal entity that violates any order of the FCC. State commissions, no less than other actors, jeopardize federal policy when they ignore FCC directives.

ARGUMENT

I. THE PREEMPTION ORDER IS AN ENFORCEABLE ORDER UNDER SECTION 401(b).

The Preemption Order, enforced below in this case, is an "order," in both form and substance, within the conventional

understanding of that term.[23] Nevertheless, the Maryland Commission argues that Section 401(b) applies only to adjudicatory orders and does not permit enforcement of orders issued in rulemaking proceedings. Such a distinction is inconsistent with the language and aim of the statute, prior precedent, and the FCC's own construction of the Act. The policy arguments urged by Maryland neither support the distinction it advocates nor apply to this case.

A. Section 401(b) Includes "Any Order" Other Than One for the Payment of Money.

In plain terms, Section 401(b) authorizes "any party injured" to bring an enforcement action in district court against "any person" who disobeys "any order" of the FCC except an order for the payment of money. This Court has repeatedly said that the statutory language is the first and best evidence of Congress' intent.[24] Section 401(b) expressly includes "any" non-money order and makes no distinction between orders issued in rulemaking proceedings and orders issued in adjudications.

Where Congress did want to create an exception to Section 401(b), it said so explicitly, by providing that orders "for the payment of money" are not embraced by the section. Because Congress has drawn its statute with precision, "evidence of . . . legislative intent" is required before a court adds "additional exceptions" nowhere expressed in the statutory language. *Andrus* v. *Glover Construction Co.,* 446 U.S. 608, 616-17 (1980). Yet the Maryland Commission has not cited the barest

[23] The Preemption Order is specifically designated by the FCC as an "order" (92 F.C.C.2d at 864), it contains ordering clauses (*id.* at 880), it is directed specifically to known parties (*id.*), and it definitively determines legal rights and responsibilities.

[24] *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 201 (1976); *FTC* v. *Bunte Bros.,* 312 U.S. 349, 350 (1941); *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917).

scrap of legislative history to suggest that Congress intended there to be a second exception to Section 401(b).[25]

The construction urged by the Maryland Commission has been squarely rejected by the FCC. That agency is responsible for the administration of the Act and an agency's views are normally accorded substantial weight in the construction of its own statute.[26] Maryland's reading has also been rejected by the Fourth Circuit (748 F.2d at 881 (Pet. App. at 4a-5a)), the Fifth Circuit (744 F.2d at 1115-19), and each of the district courts that has addressed the issue.[27] Only a single opinion, rendered by the First Circuit (742 F.2d at 4-11), offers any support to Maryland.

The First Circuit decision, so far as it rests on statutory language, relies not on Section 401(b) but on a specialized distinction between "rules" and "orders" made twelve years later in the Administrative Procedure Act ("APA"), 5 U.S.C. § 551. Those APA definitions were drawn for a specific and limited purpose, namely, to specify the *internal* procedures to be followed by agencies in different kinds of administrative proceedings.[28] The definitions were adopted "for the purpose of [the APA]" (5 U.S.C. § 551, first sentence) and not as a gloss

[25] Although the Maryland Commission (Md. Br. 33-34) cites several cases that it claims restrict enforcement actions to adjudicative orders under the predecessor of Section 401(b) (former Section 16(12) of the Interstate Commerce Act, now 49 U.S.C. § 11705(a)), that assertion is not supported by a single one of the cited cases, as a reading of the cases quickly discloses. In fact, Section 16(12) has been used to enforce rulemaking orders. See, *e.g.*, *United States* v. *City of Jackson, Mississippi*, 318 F.2d 1, 9 (5th Cir. 1963).

[26] *Chevron U.S.A.* v. *National Resources Defense Council*, 104 S. Ct. 2778 (1984); *Blum* v. *Bacon*, 457 U.S. 132 (1982); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

[27] These are the district courts in Louisiana (570 F. Supp. at 232), Maine (570 F. Supp. at 1571-77), and Washington (565 F. Supp. at 21). The opinion of the District Court in Maine was reversed by the First Circuit (742 F.2d 1).

[28] For this purpose, the APA defined the terms "rule" and "order" so that, in several respects, they are contrary to ordinary usage. A rule, for example, includes prescription of future rates for an individual company, and an order is defined to include a license. 5 U.S.C. § 551. When the APA turned its attention to judicial review it abandoned the distinction and spoke solely of "agency action." 5 U.S.C. §§ 701-05.

on other statutes. This Court has held that terms cannot be mechanically transferred from one statute to another without regard to the different contexts involved.[29] Even after the APA, Congress has repeatedly used the term "order" in a variety of statutes to include orders issued in rulemaking proceedings.[30]

The reading of Section 401(b) adopted by the Fourth and Fifth Circuits is supported by this Court's own decision in *CBS* v. *United States*, 316 U.S. 407 (1942). There, this Court construed the identical language at issue in this case ("any order"), as it appears in the very next section of the Communications Act—Section 402(a)—and this Court held that the quoted language does embrace orders issued in FCC rulemaking proceedings.[31] A similar interpretation of Section 401(b) is warranted by the "natural presumption that identical words used in different parts of the same Act are intended to have the same meaning." [32]

This "natural presumption" has special force in the present case. Section 401(b) and Section 402(a) are not merely adjacent sections in the same subchapter but both sections use the term "order" in determining whether and when parties are entitled to bring suit respecting FCC actions.[33] The anomaly of

[29] *E.g., United States* v. *American Bldg. Maintenance Industry*, 422 U.S. 271, 277 (1975); *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150 (1947).

[30] *E.g., Motor Vehicle Mfrs. Ass'n* v. *State Farm Medical Automobile Ins. Co.*, 463 U.S. 29, 34 (1983); *Gage* v. *AEC*, 479 F.2d 1214, 1218-19 (D.C. Cir. 1973); *Philadelphia Co.* v. *SEC*, 164 F.2d 889 (D.C. Cir. 1947), *cert. denied*, 333 U.S. 828 (1948); *Sima Products Corp.* v. *McLucas*, 612 F.2d 309 (7th Cir.), *cert. denied*, 446 U.S. 908 (1980).

[31] In *CBS*, the network brought suit to challenge the validity of two orders of the FCC promulgating the so-called chain broadcasting regulations. Section 402(a), on which the suit was premised, permitted actions to review "any order" of the FCC except those involving licenses. Permitting the suit to proceed, this Court held in *CBS* that the phrase "any order" in Section 402(a) did embrace orders promulgated in a rulemaking proceeding.

[32] *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). Accord, *Director, Office of Workers' Compensation Programs* v. *Forsyth Energy, Inc.*, 666 F.2d 1104, 1107 (7th Cir. 1981).

[33] The Maryland Commission says that *CBS* rests on a presumption that agency decisions are reviewable; but it should also be presumed that agency decisions are enforceable.

the First Circuit's reading, and its departure from *CBS*, is underscored by the result: under the First Circuit's decision, the Preemption Order would be an order (under Section 402(a)) so that any state could seek direct judicial review of it; yet it would not be an order (under Section 401(b)) if a state commission chose to disobey it and to resist an enforcement action. This kind of asymmetry makes no sense.

The reading urged by the Maryland Commission would also open a gap in the provisions for court enforcement of the Communications Act and the FCC's directives. Section 401(a) provides expressly for mandamus actions to enforce provisions of the Act itself, and Section 401(b) provides for injunctive actions to enforce FCC orders. There is no separate statutory provision providing for court actions to enforce FCC orders issued in rulemaking proceedings. If Section 401(b) were read to exclude such rulemaking orders, as the Maryland Commission urges, it would mean that Congress had neglected to provide for Court enforcement of a major class of agency directives. It defies common sense to attribute such an intention to Congress.[34]

In providing for injunction actions by "any party injured" by violation of an FCC order, Congress made clear its intent to enlist private enforcement to supplement the limited enforcement resources of the agency. The FCC in turn has welcomed private actions under Section 401(b) to enforce its Preemption Order. As it advised the First Circuit:

> "The very justification for a private enforcement statute such as Section 401(b) is that the agency may not have the resources to police every violation of its

[34] The First Circuit was led astray on this point because it assumed that rules or orders issued in rulemaking proceedings can be enforced by mandamus actions under Section 401(a). 742 F.2d at 9. Section 401(a), however, applies expressly only to violations of the Act's own provisions. Although conduct violating such an FCC rule or order might also happen to violate the Act itself, nothing in the statute converts every violation of a rule or order into a violation of the Act. Compare Sections 501-02, 47 U.S.C. §§ 501-02 (setting different penalties for statutory and rule violations).

> orders and that aggrieved private parties with something at stake can help it with its job."[35]

Here, the FCC had made the policy decisions, which were its main responsibility, in the Depreciation Orders and the Preemption Order. By policing individual violations of settled FCC directives, the private plaintiffs in Section 401(b) actions were doing exactly the job that Congress envisaged.

B. The Policy Objections to Enforcement Are Without Merit and Do Not Apply to the Order in This Case.

The broad purpose of Section 401(b), like other enforcement provisions, is remedial. Congress plainly wanted to achieve prompt and effective enforcement of FCC directives.[36] It is well settled that remedial provisions are to be interpreted liberally to achieve that legislative purpose.[37] In this case, no stretching of statutory language is necessary. Merely reading Section 401(b) in accordance with its terms, to embrace "any [non-money] orders," will assist the FCC in its administration of the Act.

The First Circuit, now echoed by the Maryland Commission, offered a pair of policy objections to allowing Section 401(b) actions to enforce orders entered in FCC rulemaking proceedings. The objections do not support a distinction between orders entered in adjudicatory proceedings and those entered in rulemakings. Moreover, the objections have no conceivable application to the very Preemption Order involved in this case.

[35] Memorandum of the FCC in support of petition for rehearing, July 27, 1984, p. 14, in *New England Telephone and Telegraph Co.* v. *Public Utilities Commission of Maine*.

[36] This aim is evidenced not merely by the express provision for private enforcement but also by the unusual mandatory directive that, if the formal requirements of Section 401(b) are met, the district court "shall" issue an injunction.

[37] E.g., *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967).

First, the First Circuit is mistaken in its assumption that adjudicatory orders are inherently precise (and therefore uniquely fit for immediate enforcement in private suits) while, by contrast, orders issued in rulemaking proceedings are likely to be vague and inappropriate for private enforcement. Rulemaking orders may be very precise and adjudicatory orders may be cast in highly general terms. In fact, an agency usually has wide discretion whether to use adjudication or rulemaking in making a particular determination. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). The FCC has made similar preemptive decisions *both* in rulemakings and in adjudications, depending solely on the procedural context in which the preemption issue happened to arise.[38]

Of course, an agency rulemaking order—or an adjudicatory order—may present a court with difficult problems of interpretation. The anti-fraud and proxy disclosure rules of the SEC, which are routinely the basis for private injunctive and damage actions in the federal courts, are notoriously difficult to construe.[39] However, where a court would be aided by the agency's help, it normally has no difficulty in seeking the agency's interpretation, whether a rulemaking or an adjudicatory order is in issue. Agencies including the FCC are regularly asked by courts to construe disputed agency rules or orders, either formally through references under the primary jurisdic-

[38] For example, one of the FCC's most important and generally phrased preemptive rulings was made in a declaratory order concerning connection of telephone equipment to the network. *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). Such an order would clearly be classified as an adjudication under the APA. 5 U.S.C. § 554(e). By contrast, another far-reaching preemptive decision, concerning the detariffing of carrier-provided telephones, was made in a rulemaking proceeding where new substantive rules were being formulated. *Computer & Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[39] See, *e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976) (Section 10(b) and rule 10b-5 of the Securities Exchange Act prohibiting "fraud or deceit" in securities transactions); *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438 (1976) (SEC proxy rules barring "false or misleading" statements).

tion doctrine or through amici briefs or other less formal means.[40] That opportunity is a complete answer to the First Circuit's concern.[41]

Second, the First Circuit expressed concern that, if orders issued in rulemakings could be enforced under Section 401(b), such an action might be brought against parties who had no knowledge of the order at the time it was entered and could not have protected themselves by seeking timely review of the order in a court of appeals under Section 402(a). However, Section 401(b) provides that, as a prerequisite to an injunction, the district court must find that the order to be enforced was duly served on the disobedient person. Often, as in the present case, the subject is served with or otherwise notified of the FCC order when the order is issued and has ample opportunity, as the state commissions did here, to seek immediate judicial review under Section 402(a).

In any event, rules are commonly enforced in court against parties who never participated in their formulation and may not even have existed when the rules were adopted. The judicial process is flexible enough to permit a belated challenge to an underlying rule where that course is appropriate.[42] However, a party who did not have a prior opportunity to challenge a rule is not given permanent immunity from its enforcement. The problem raised by the First Circuit does not support a refusal to allow enforcement actions merely because an order happens to derive from a rulemaking proceeding.

It should be stressed that *neither* of the concerns of the First Circuit has *any* application to the present case. The Preemption Order is in no way unclear: in substance it is a

[40] *E.g.*, *Carter* v. *AT&T*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967); *Chastain* v. *AT&T*, 351 F. Supp. 1320 (D.D.C. 1972).

[41] Directly on point is *Pacific Fruit Express* v. *Akron, C. & Y. R.R.*, 355 F. Supp. 700, 705-06 (N.D. Cal. 1973), *aff'd*, 524 F.2d 1025 (9th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976), where the District Court directed specific questions to the ICC in an enforcement action brought under the provisions of the Interstate Commerce Act from which Section 401(b) was derived.

[42] See, *e.g.*, *Functional Music, Inc.* v. *FCC*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

directive that SLELG and remaining life methods be permitted in state ratemaking proceedings. Neither the Maryland Commission, nor any of the other commissions who defied the Preemption Order, has ever expressed any legitimate doubt about the meaning of the order; rather, the recalcitrant state commissions have said that they will not obey the Preemption Order because they believe it is unlawful. See p. 5, above.

As for notice, the state commissions had ample opportunity to seek timely review of the Preemption Order under the Hobbs Act. All of the state commissions were served with copies of the order when it was released (92 F.C.C.2d at 888) and over 20 of them joined in a direct review action to challenge the order in the Fourth Circuit. See p. 5, above. Those commissions that failed to join in the Fourth Circuit challenge did so deliberately and not because of any lack of notice as to the existence or contents of the Preemption Order. Whatever strength the First Circuit's concerns might have in other contexts, they do not support the refusal to enforce the Preemption Order in this case.

Increasingly, agency proceedings do not fall into neatly labeled compartments. The FCC makes preemption determinations in both adjudications and rulemakings (see p. 14, above), and the Preemption Order itself arose out of hybrid proceeding that combined rulemaking and adjudication. See p. 3, n.10, above. Where a federal agency has issued a clear order and that order is clearly being disobeyed, the policies favoring prompt and effective enforcement of agency orders apply with equal force, whatever label may be attached to the proceeding that gave rise to the agency order.

There may be cases where an agency order is not appropriate for immediate court enforcement. But as with reviewability, such exceptions must turn on the realities of finality, clarity, and injury, rather than on mechanical classification.[43] Any appraisal of the realities in *this case* makes clear that the Preemption Order was fully suited to immediate enforcement: it was

[43] See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967); *Gardner* v. *Toilet Goods Association*, 387 U.S. 167 (1967).

specific, definitive and binding, and its disregard by the Maryland Commission was unquestionably causing immediate and substantial harm.

II. THE MARYLAND COMMISSION AND ITS INDIVIDUAL MEMBERS ARE "PERSONS" UNDER SECTION 401(b).

The Fourth Circuit held that the Maryland Commission is a "person" subject to an enforcement action under Section 401(b). Six other courts have agreed with this reading of the Act.[44] Furthermore, the Fourth Circuit said that C&P's suit "named not only [the Maryland Commission] but also the officials comprising [the agency] as defendants," and the court held that the commissioners as individuals are "expressly covered" by Section 401(b). 748 F.2d at 881 (Pet. App. at 4a). Each alternative holding is independently sufficient to sustain the District Court's injunction.

A. The Individual State Commissioners Are "Persons."

The Fourth Circuit correctly determined that the individual Maryland commissioners, specifically named in C&P's suit for injunctive relief, are expressly covered by Section 401(b). Section 401(b) provides that the district courts shall enforce any order of the FCC, except for the payment of money, against "any person" who fails to obey any order of the FCC. The term "person" is defined elsewhere in the Act to include "an individual" (Section 3(i), 47 U.S.C. § 153(i)) and the members of the Maryland Commission are clearly "individuals" in the ordinary usage of that term. Just last Term, this Court reaffirmed the basic canon of construction that, when the terms of a statute are unambiguous, judicial inquiry is ordinarily complete.[45]

[44] These are the Fifth Circuit (744 F.2d at 1115-16) and district courts in the enforcement actions in Louisiana (570 F. Supp at 236), Maine (570 F. Supp. at 1567-68), Wisconsin (slip op. at 7-8), Montana (588 F. Supp. at 7), and Washington (565 F. Supp. at 21). The Vermont District Court disagreed (576 F. Supp. at 493-96).

[45] *Garcia* v. *United States*, 105 S.Ct. 479, 483 (1984). See also *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980); *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978).

A literal reading of Section 401(b) is also warranted in order to carry out its evident purpose to achieve prompt and effective enforcement of FCC directives under the Act. That Act not only governs carriers and licensees but establishes a framework delineating the respective spheres of authority of the federal and state commissions. Clearly a state agency would be in violation of the Act if it sought to fix interstate rates for a telephone company,[46] or to prohibit use of customer-supplied equipment for communication over the network,[47] or to disregard an order separating interstate from intrastate costs and investment.[48] The states, which are quick to claim rights under the Act, are no less subject to the Act's limitations.

If state regulatory officials exceed their authority as defined by federal law, their actions can severely frustrate federal communications policy.[49] That is why Congress entrusted the FCC with overriding power to determine depreciation and why the courts have upheld the FCC's power to preempt in a variety of contexts. If a state governor or city mayor sought to operate a local radio station without procuring a radio license from the FCC, no one would doubt that an injunction was proper.[50] The Maryland commissioners, in defying the FCC's Preemption Order, stand on no different footing.

For over 50 years, federal courts have issued injunctions against state officials who, under color of state law, were found

[46] See *New York Telephone Company* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980).

[47] See *North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977).

[48] See *Illinois Bell Telephone Co.* v. *Illinois Commerce Comm'n*, *supra*, 740 F.2d at 587.

[49] See *Capital Cities Cable* v. *Crisp*, 104 S.Ct. 2694, 2703 (1984); *Computer & Communications Industry Ass'n* v. *FCC*, *supra*, 693 F.2d 198; *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

[50] Section 301, 47 U.S.C. § 301, forbids radio broadcasting by any "person" without an FCC license. No one doubts that this constrains state and city stations as well as private ones. *Cf. City of New York* v. *Federal Radio Comm'n*, 36 F.2d 115 (D.C. Cir. 1929), *cert. denied*, 281 U.S. 729 (1930).

to be acting in violation of federal limitations.[51] *Ex parte Young*, the foundation case in this line of authority, made clear that a state officer cannot claim the protection of the state's sovereign immunity if his action is contrary to federal law. 209 U.S. at 159-60. Although *Ex parte Young* and many later cases involved unlawful actions by state regulators against utilities and carriers, today "it provides the basis for forcing states to desegregate their schools" and the doctrine is "indispensable" to our constitutional jurisprudence. See Wright, *supra* note 51, at 292.

Section 401(b), so far as it is directed against violations of the Act by state officials, mirrors the federal remedy recognized in *Ex parte Young*. Where, as here, the relief sought is merely to "enjoin state officials to conform their future conduct to the requirements of federal law," it is well settled that constitutional concerns are not implicated. *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979).[52] In light of the FCC's Preemption Order, the Maryland commissioners are acting in patent violation of federal law, for preemption by a federal agency is no less a federal command than preemption by Congress itself. See *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, 458 U.S. 141, 153-54 (1982).

Without directly claiming a violation of the Johnson Act, 28 U.S.C. § 1342, the Maryland Commission and the state amici argue that that statute reflects a general hostility to federal injunctions against state rate orders. In fact, the Johnson Act makes clear that it precludes only a limited class of injunction actions against state rate orders, *i.e.*, those actions

[51] *Ex parte Young*, 209 U.S. 123 (1908); *Florida Department of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982); *Quern* v. *Jordan*, 440 U.S. 332 (1979); *Hutto* v. *Finney*, 437 U.S. 678 (1978). See C. Wright, *Federal Courts* 292 (4th ed. 1983).

[52] This case does not involve any attempt to seek monetary relief from the state treasury (*Edelman* v. *Jordan*, 415 U.S. 651 (1974)) or any claim that a state officer is acting in violation of *state* law. *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984).

which meet *each* of four separate conditions.[53] It was not designed to cripple enforcement of FCC orders serving national policy goals but to confine to state courts intrinsically local disputes concerning the reasonableness of utility rates. The Johnson Act is a limited exception to the general rule that federal rights may be enforced in federal courts; in cases where the Johnson Act does not apply, injunctive relief remains available.

It is crystal clear that the Johnson Act does not apply to the present case. First, jurisdiction over the injunction action in the District Court did not rest "solely" upon diversity or the Constitution;[54] and second, the state commission's action does interfere with interstate commerce.[55] The Fourth Circuit and every other lower court that has addressed the Johnson Act in Section 401(b) cases have agreed that the Johnson Act is not applicable.[56] Any construction of the Johnson Act that ignores its precise terms and limited purpose would not only frustrate the private suits that Congress intended to preserve but would also frustrate the Government's own enforcement of the Communications Act and FCC orders as well.

[53] The Johnson Act applies only where jurisdiction in the injunction suit is (1) "based solely on diversity of citizenship or repugnance of the order to the Federal Constitution" *and* (2) the order does not "interfere with interstate commerce" *and* (3) it has been made after "reasonable notice and hearing" *and* (4) there is an adequate state remedy. 28 U.S.C. § 1342.

[54] In this case, jurisdiction over the suit rests directly upon a federal statute (Section 401(b)) and asserts a violation of a specific federal agency order. See, *e.g.*, *South Central Bell Telephone* v. *Louisiana Public Service Commission*, 744 F.2d 1107, 1123 n.28 (5th Cir. 1984), *appeal filed*, No. 84-870.

[55] Because the telephone plant being depreciated here is used interchangeably for both interstate and intrastate communication, the FCC properly found that inconsistent state depreciation rules would frustrate federal policy designed to promote interstate commerce. *Cf. Public Utilities Commission of Ohio* v. *United Fuel and Gas Co.*, 317 U.S. 456 (1943) (Johnson Act not applicable to state orders impinging on authority of FPC).

[56] See, in addition to the Fourth Circuit's decision (748 F.2d at 881-82 (Pet. App. at 6a-7a)), the Fifth Circuit's decision (744 F.2d at 1123 n.28), and the district court decisions in Louisiana (570 F. Supp. at 233-34), Maine (570 F. Supp. at 1566-67), and Wisconsin (slip op. at 4).

Finally, the Maryland Commission argues that, if the Court finds that Section 401(b) does not embrace state commissions as "persons," then it must follow that Congress must have intended to bar suits against individual commissioners. Md. Br. 20-21. On the contrary, there is no specific evidence in the legislative history that Congress intended to bar suits against *either* state commissions or state commissioners under Section 401(b). If Section 401(b) is read not to include state commissions, that result can rest only upon the linguistic accident that Congress did not specifically name state commissions in its definition of "person," coupled with a policy of narrow construction.

Neither of these considerations bars a suit against state commissioners. They are clearly "persons" under Section 401(b). Such officers, acting under color of state law, have traditionally been subject to federal injunction actions brought to enforce federal rights under the *Ex parte Young* doctrine. And no Eleventh Amendment interests are implicated because "since *Ex parte Young* . . . it has been settled that the Eleventh Amendment provides no shield for a state official" where the charge is that the official is violating federal law under color of state authority. *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974).[57]

B. The Maryland Commission Is a "Person" Under Section 401(b).

The Fourth Circuit was also correct in its alternative holding that the Maryland Commission is a "person" subject to an enforcement action under Section 401(b). The term "person" is widely construed in federal statutes to include states and state agencies.[58] This is so where the federal statute lays

[57] See S. Ct. R. 21(1); the Maryland Commission did not assert any Eleventh Amendment objection either in its petition for certiorari or at any stage of the proceedings. See *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 515-16 n.19 (1982).

[58] *E.g.*, *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 452 (1945); *Georgia* v. *Evans*, 316 U.S. 159, 160-63 (1942); *United States* v. *Illinois*, 454 F.2d 297, 301 (7th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972); *United States* v. *Massachusetts Bay Transportation Authority*, 614 F.2d 27, 28 (1st Cir. 1980).

burdens on the state, as well as where the state benefits, and where a statute defines "person" to include various entities without mentioning states.[59]

Similarly, in the Communications Act, state agencies have been treated as "persons" for various purposes.[60] Nothing in the linguistic structure of the Act precludes the treatment of state commissions as persons. The definitional language of Section 3(i) is illustrative and not exclusive, as even the Maryland Commission admits. Md. Br. 12-13.[61] Maryland says that the language only extends to "like" entities; but where a state commission is violating an FCC order, it is "like" an "individual . . . or corporation" (Section 3(i)) in this crucial respect. Neither the separate definition of "state commission"

[59] *Ohio* v. *Helvering*, 292 U.S. 360 (1934), illustrates both points, for the Court there held that Ohio was a "person" under the Internal Revenue Code and taxable on its sale of liquor even though "person" was defined as including "a partnership, association, company, or corporation, as well as a natural person." *Id.* at 368. See also *Sims* v. *United States*, 359 U.S. 108 (1959) (a state is a "person" so that United States may levy upon unpaid salaries of state employees to recover federal taxes); *United States* v. *California*, 297 U.S. 175 (1936) (state owned railroad subject to federal safety standards).

[60] For example, Section 405, 47 U.S.C. § 405, provides that "any . . . person" aggrieved by an FCC action may petition for reconsideration, as California and its state commission did when dissatisfied with the original Depreciation Orders which are the origin of this case. See p. 3, above. See also Section 5(c)(4), 47 U.S.C. § 155(c)(4), providing that "any person aggrieved" by an FCC staff decision may seek review by the FCC itself. At several places, the Act directs the FCC to give notice to "the State Commission . . . and [to] such other persons" as the FCC shall direct. Sections 221(a) and (c), 47 U.S.C. §§ 221(a), (c).

[61] See *Pfizer, Inc.* v. *India*, 434 U.S. 308, 312 n.9 (1978) (foreign government is a "person" although not mentioned in definition); *Federal Land Bank of St. Paul* v. *Bismark Lumber Co.*, 314 U.S. 95, 99-100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle").

in the statute [62] nor any other provision of the statute [63] rules out the treatment of state commissions as persons under the Act.

Here, as elsewhere, a state commission may fairly be treated as a "person" under a federal statute where that outcome is consistent with the purpose of the statute.[64] As we have already shown, the state agencies are actors within the plan of the Communications Act, which imposes limitations upon them just as it confers on them certain authority. See p. 18, above. Through their actions in attempting to regulate carriers, the states can transgress the limitations of the Act and can frustrate its purposes, as surely as any private carrier. See p. 18, above. Indeed, in this very case, the FCC found that the states' disregard of the Depreciation Orders was frustrating the objectives of the FCC in fostering a modern communications network for the country. 92 F.C.C.2d at 877. Plainly, prompt and effective enforcement of the Act was an objective of Congress, and treating the states as "persons" for purposes of Section 401 is consistent with this objective.

To underscore the point, it should be remembered that the term "person" is also used in Section 401(a) which authorizes

[62] The fact that "state commission" has a separate definition (Section 3(t), 47 U.S.C. § 153(t)) proves nothing, because various sections of the Act refer specifically to "state commissions" (*e.g.*, Section 220, 47 U.S.C. § 220), so that it was suitable to have a separate definition to implement those sections. Furthermore, the separate definitions in the statute are not mutually exclusive. In addition to "state commission," the terms "licensee," "corporation," "connecting carrier," and "broadcast station" are all defined separately, yet those entities clearly are "persons" subject to enforcement actions in federal courts.

[63] The juxtaposition of "person" and "state commission" in Section 208, 47 U.S.C. § 208, merely confirms that Congress was especially cautious in one instance to assure that state agencies would be recognized as complainants; it can be matched by other instances in which state commissions are included under sections of the Act that refer only to "person" or refer to "state commissions . . . and . . . other persons." See p. 22, n.60, above.

[64] See, *e.g.*, *Georgia* v. *Evans*, *supra*, 316 U.S. at 161; *Sims* v. *United States*, 359 U.S. 108, 112 (1959); *Ohio* v. *Helvering*, 292 U.S. 360, 370 (1934).

suits by the United States to enforce the provisions of the Act; and Section 401(b), using the same term, provides for suits to enforce FCC orders by the United States or the FCC, as well as private parties. A reading of the Act that excluded state commissions from the term "person" would impair enforcement of the Act and of FCC orders where such suits were brought in federal court by the United States or the FCC.[65] Such a reading would frustrate the objectives of Congress.

The Maryland Commission has argued that the present injunction action constitutes interference with state ratemaking or local affairs and disregards the regime of dual regulation established by the Act. Md. Br. 15-21. This argument confuses the substantive obligation of the states to respect FCC depreciation decisions—at issue in No. 84-871—with the narrower procedural question of enforcement. The substantive obligation of the state commissions has nothing to do with Section 401(b); it rests directly upon the Act's substantive provisions (*e.g.*, Section 220) and the FCC's Preemption Order. To the extent that this substantive obligation affects state ratemaking proceedings and local interests, it is because Congress and the FCC determined that depreciation of telephone plant is so related to interstate interests that local interests must give way to a uniform scheme of federal regulation.[66]

Given the obligation of states to respect FCC depreciation decisions, the question here is whether that federal obligation can be enforced in a federal injunction action under Section 401(b). The settled presumption is that federal rights are normally enforceable in federal court actions unless Congress has specifically provided otherwise. See p. 20, above. Section 401(b) codifies that presumption, where FCC orders are

[65] *Atascadero State Hospital* v. *Scanlon*, 105 S.Ct. 3142 (1985), is clearly distinguishable on this ground, in addition to the fact that in that case monetary relief was being sought from the state.

[66] The depreciation in state agency proceedings is depreciation of telephone-company equipment that is virtually all used interchangeably for interstate and intrastate communication; and the depreciation rates affect the ability and incentive of carriers to invest in new equipment which will be used for both purposes.

violated, without drawing any distinction between state agencies and other violators. It does not intrude upon state authority, in any meaningful sense, to require prompt and effective obedience by state agencies to an outstanding and effective federal order *which applies to them*.

Similarly without merit is the claim that the enforcement of federal orders in federal courts will entangle federal judges in matters beyond their capacity or ken. Md. Br. 38. In most of the Section 401(b) cases brought to enforce the FCC's Preemption Order, the litigation has been straightforward. In such instances, the state agency has admittedly refused to permit the use of SLELG or remaining life; and in almost every case, the state has obeyed the federal injunction when it has been issued. The injunctions have merely required the state to accept FCC-approved depreciation methods and otherwise left the states free to conduct their own ratemaking proceedings under their usual standards.

The only important exception, mistakenly emphasized by the Maryland Commission, is the injunction action brought against the Louisiana Commission. After that injunction was granted, the state commission engaged in what the Louisiana District Court thereafter found to be nothing more than a subterfuge to evade the injunction.[67] The Louisiana episode is atypical because most state commissions do not disregard federal injunctions. It does illustrate how important it is to maintain the possibility of federal injunctive relief to assure that federal orders are obeyed.

[67] The state commission allowed the new depreciation rates but made an offsetting reduction in the rate of return to keep the revenue requirement close to its original level. 570 F. Supp. at 237-38. It did so without any evidence or independent basis for reducing the rate of return beyond a patent attempt to frustrate the federal injunction. *Id.* Quite appropriately, the District Court enjoined this action, not because it violated the FCC's Preemption Order but because it thwarted the injunction itself. *Id.* See brief for the United States as *amicus curiae* in No. 84-483, *et al.*, pp. 11-12.

Finally, there is no general requirement that *state* court remedies be exhausted before a federal requirement is enforced in a federal court against a state official or agency. Compare Md. Br. 20.[68] A federal court, for example, can clearly enjoin a local school board to desegregate local schools without waiting until state court remedies have been exhausted. Congress may make exceptions to this rule and require that certain federal matters be resolved by state courts in the first instance. However, no such congressional exhaustion requirement exists in the present case. Instead, Section 401(b) expresses Congress' intent that violations of FCC orders by "any person" be remedied in federal court.

[68] On the contrary, the "traditional rule" is that state administrative remedies must be exhausted but state judicial remedies need not be. Wright, *supra* note 51, at 293.

CONCLUSION

For the reasons stated, the decision should be affirmed.

Respectfully submitted,

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APPENDIX A

Subscribing Parties

American Telephone and Telegraph Company

Illinois Bell Telephone Company

Indiana Bell Telephone Company

Michigan Bell Telephone Company

New England Telephone and Telegraph Company

New Jersey Bell Telephone Company

New York Telephone Company

The Ohio Bell Telephone Company

South Central Bell Telephone Company

Southern Bell Telephone and Telegraph Company

Southwestern Bell Telephone Company

Wisconsin Bell Inc.

Rule 28.1 Listing *

Amicus American Telephone and Telegraph Company retains a minority beneficial interest in Cincinnati Bell Inc. held in a voting trust.

Amici Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company and Wisconsin Bell Inc. are subsidiaries of American Information Technologies Corporation.

Amici New England Telephone and Telegraph Company and New York Telephone Company are subsidiaries of NYNEX Corporation.

Amici South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company are subsidiaries of BellSouth Corporation. FiberLAN, Inc. is a partially owned subsidiary of BellSouth Corporation.

Amici Southwestern Bell Telephone Company is a subsidiary of Southwestern Bell Corporation.

* Counsel understand S. Ct. R. 28.1 to require disclosure only of those subsidiaries or affiliates with outstanding securities in the hands of the public.

APPENDIX B

Arkansas

Southwestern Bell Telephone Co. v. *Arkansas Public Service Comm'n,* 584 F. Supp. 1087 (D. Ark.), *rev'd,* 378 F.2d 901 (8th Cir. 1984), *petition for cert. filed,* No. 84-483.

Iowa

Northwestern Bell Telephone Co. v. *Iowa State Commerce Comm'n,* No. 83-688-A (S.D. Iowa Sept. 27, 1984).

Kansas

Southwestern Bell Telephone Co. v. *State Corporation Comm'n,* No. 83-4090 (D. Kan. Apr. 8, 1983).

Louisiana

South Central Bell Telephone Co. v. *Louisiana Public Service Comm'n,* 570 F. Supp. 227 (M.D. La. 1983), *aff'd,* 744 F.2d 1107 (5th Cir. 1984), *appeal filed,* No. 84-870.

Maine

New England Telephone & Telegraph Co. v. *Public Utils. Comm'n of Maine,* 570 F. Supp. 1558 (D. Me. 1983), *rev'd,* 742 F.2d 1 (1st Cir. 1984), *petition for cert. filed,* No. 84-900.

Maryland

Chesapeake & Potomac Telephone Co. of Maryland v. *Public Service Comm'n of Maryland,* 560 F. Supp. 844 (D. Md. 1983), *aff'd,* 748 F.2d 879 (4th Cir. 1984), *petition for cert. granted,* No. 84-1362.

Montana

Mountain States Telephone and Telegraph Co. v. *Department of Public Service Regulation,* 588 F. Supp. 5 (D. Mont. 1983).

Vermont

New England Telephone and Telegraph Co. v. *Public Service Board of Vermont,* 576 F. Supp. 490 (D. Vt. 1983), *vacated as moot,* No. 84-7051 (2d Cir. Dec. 5, 1984).

Washington

Pacific Northwest Bell Telephone Co. v. *Washington Utilities & Transportation Comm'n,* 565 F. Supp. 17 (W.D. Wash. 1983), *appeal pending,* No. 83-3746 (9th Cir.).

Wisconsin

Wisconsin Bell, Inc. v. *Public Service Comm'n of Wisconsin,* No. 84-C-4 (E.D. Wis. Nov. 13, 1984), *appeal pending,* No. 84-3110 (7th Cir.).